TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1913~~ 1914

No. ~~494~~ 97

HENRY A. GILBERT, ADMINISTRATOR OF ISAAC H. SELLECK, DECEASED, PLAINTIFF IN ERROR,

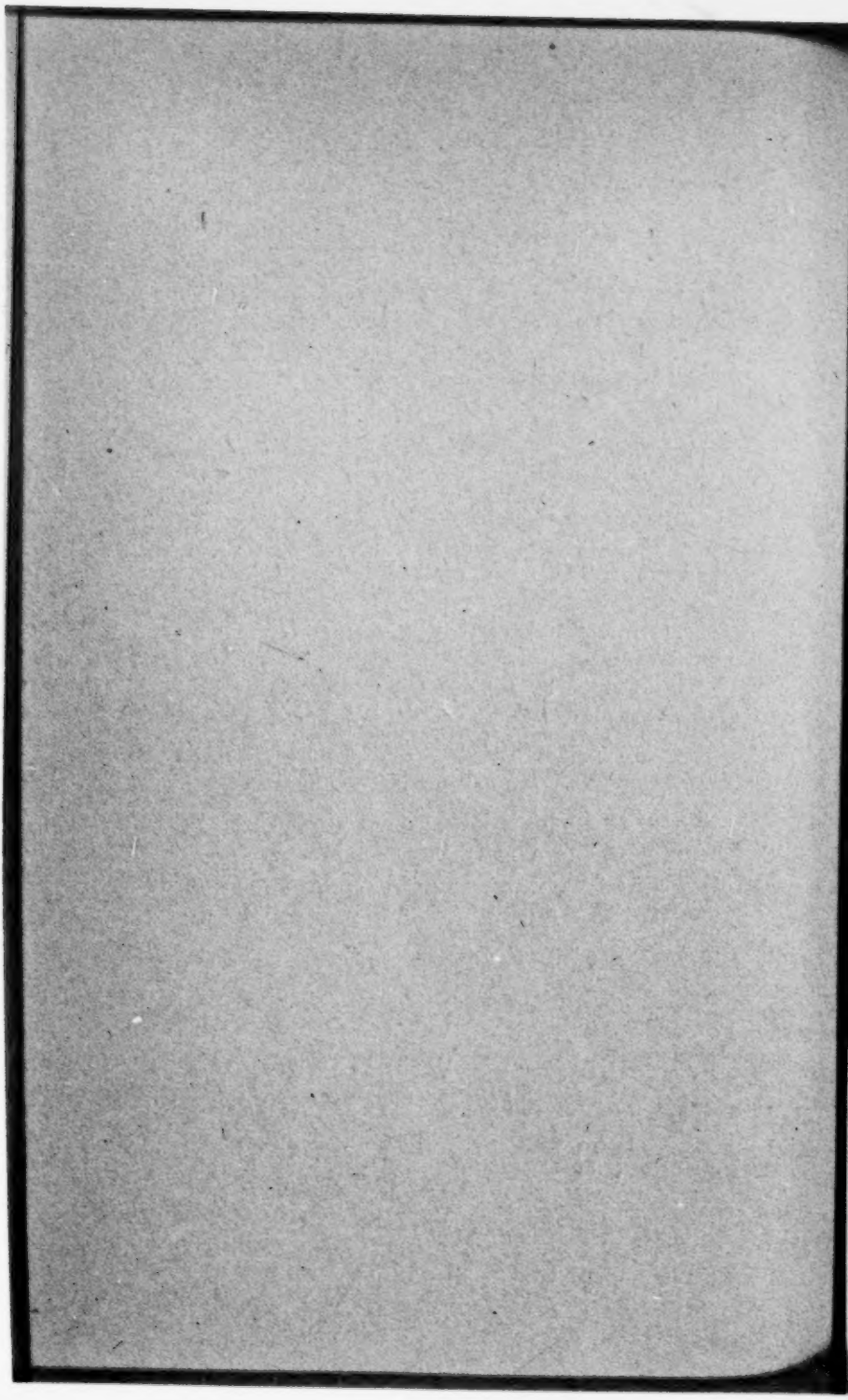
vs.

EMMA S. DAVID, ADMINISTRATRIX OF DARIUS SELLECK, DECEASED, AND BENJAMIN S. SELLECK AND ROBERT SELLECK, EXECUTOR OF BENJAMIN SELLECK, DECEASED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED JANUARY 18, 1913.

(23,499)



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OCTOBER TERM, 1913.

No. 424.

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1 Supreme Court of the U. S. of America.

ISAAC H. SELLECK, Plaintiff in Error (Plaintiff Below),
against
EMMA S. DAVID, Administratrix, et al., Defendants in Error (Defendants Below).

Error to the District Court of the United States for the District of Connecticut.

The Supreme Court of the United States of America.

The President of the United States of America to the Judge of the District Court of the United States for the District of Connecticut, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between Isaac H. Selleck now deceased, appearing by Henry A. Gilbert, his administrator with the will annexed, as plaintiff, and Emma S. David, administratrix with the will annexed of Darius Selleck, deceased, and Benjamin S. Selleck and Robert Selleck, executors of the last will of Benjamin Selleck deceased, defendants, a manifest error hath happened to the great prejudice and damage of the plaintiff as is said and appeared by the petition herein:

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record, and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at the City of Washington, D. C., together with this writ, so that you have the same at the City of Washington, in the District of Columbia, on the 9th day of January, 1913, next in the said Supreme Court of the United States of America, to be then and there held, that the record, and proceedings aforesaid, being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

2

Witness the Honorable Edward Douglass White, Chief Justice of the United States this 10th day of December, 1912.

[SEAL.]

R. F. CARROLL,
Deputy Clerk U. S. Dist. Court.

The foregoing writ of error is hereby allowed this 10th day of December, 1912.

JAMES L. MARTIN,
United States Judge.

NOBLE E. PIERCE,
H. W. TAYLOR,
Attorneys for Plaintiff in Error.

DECEMBER 19, 1912.

Due and legal service of above writ of error is hereby accepted.
BRISTOL, STODDARD, BEACH & FISHER,
JOHN K. BEACH, *Attorneys for Defendant.*

[Endorsed:] Dist. Court of U. S., Dist. of Connecticut. Isaac H. Selleck vs. Emma S. David et al. Writ of Error.

3 *The Return of the Honorable James P. Platt, Judge of the District Court of the United States for the District of Connecticut, to the Foregoing Writ.*

The record of the proceedings and *in* the judgment upon a plea and all things concerning the same whereof mention is therein made follow in these words, to-wit:

Be it Remembered that on the 5th day of November, 1904, Benjamin Selleck and Emma S. David were summoned to appear before the United States Circuit Court in and for the District of Connecticut, to be held at New Haven, for the said District, on the fourth Tuesday of April, 1905, then and there to answer unto Isaac Selleck of Menominee, Michigan in a civil action wherein the plaintiff complains and says:—

4 UNITED STATES OF AMERICA,
District of Connecticut:

The President of the United States of America to the Marshal of the District of Connecticut, Greeting:

You are hereby commanded to attach to the value of Eighteen Thousand Dollars, ($18,000) the goods or estate of Benjamin Selleck, of Danbury in said District, and him (the said Benjamin Selleck) and Emma S. David, as sole executrix under the last will and testament of Darious Selleck, late of said Danbury, in said District deceased, summon to appear before the United States Circuit Court for the District of Connecticut, to be held at New Haven, in said District, on the fourth Tuesday of April 1905, then and there to answer unto Isaac H. Selleck of Menominee, Michigan, in a civil action wherein the plaintiff complains and says:—

1. The plaintiff is a citizen of the State of Michigan, and the defendants are citizens of the State of Connecticut.

2. On and previous to November 8, 1883, the plaintiff herein and his mother, Martha A. Selleck, and his father William B. Selleck, then in full life, but since deceased and all of them on said 8th day of November 1883, residents of Pleasant Prairie, Kenosha County, Wisconsin, were legally indebted to Daniel Head of Kenosha, in said Kenosha County, State of Wisconsin, and to Dan Head & Co., a banking company of said Kenosha by said notes, amounting in the whole to between $3,100 and $3,200.

3. On said November 8, 1883, the plaintiff herein, in order to relieve himself his father and his mother from any further liability

on said notes to the said Head individually and Dan Head & Co., sold, assigned, transferred and made over all of his (the plaintiff's) right, title and interest in certain personal property, then owned and belonging to the plaintiff and situated on certain farms in said Pleasant Prairie to the defendant herein, Benjamin Selleck
5 and to the defendant intestate, Darious Selleck, then in full life, and on the same day the plaintiff herein executed and delivered a bill of sale of said personal property to the said Defendants, Benjamin Selleck and Darious Selleck and they both accepted said bill of sale, and caused the same to be recorded pursuant to the laws of the State of Wisconsin on the land records of the town of said Pleasant Prairie on said 8th day of November, 1883.

4. The defendant Benjamin Selleck and the said Darious Selleck (now deceased) accepted said bill of sale and took possession of said property, and agreed among other things to and with the plaintiff herein that in consideration of said transfer, they would save the plaintiff, his father and his mother pecuniarily harmless, by reason of their obligation on said notes to Head individually and Dan Head & Co., and that they would pay, satisfy and extinguish said obligations to Head individually and Dan Head & Co.

5. Afterwards two separate actions were brought on said notes in the name of Head, and judgments were rendered on said notes in each of said actions against the plaintiff and his mother Martha A. Selleck and his father William B. Selleck by the Circuit Court of Kenosha County, State of Wisconsin, the First of said judgments was rendered November 17, 1884, in an action commenced October 1884, and the second of said judgments was rendered November 18, 1886 in an action commenced January 13, 1885.

6. At the times that each of the actions in the last paragraph mentioned were brought, and continuously from said respective times until on or about the first day of November, 1885, the defendant herein Benjamin Selleck and Darious Selleck (now deceased) in consideration of having received said personal property from the plaintiff and his title thereto renewed their promise to the plaintiff to save him and his mother, Martha A. Selleck, and his father William B. Selleck, from pecuniary loss by reason of their liability on said obligations as set forth in paragraph three of this
6 complaint, employed and paid Counsel to defend said actions in the name of plaintiff, and his father and mother, and they further agreed for and in consideration of the premises and in consideration of their having bought of the plaintiff herein personal property and all of his right title and interest herein to save the plaintiff and his mother Martha A. Selleck and his father William B. Selleck from all pecuniary loss whatsoever by reason of said actions then brought in the name of said Head on said notes.

7. The defendant herein Benjamin Selleck and the said Darius Selleck (now deceased) failed and neglected to save the plaintiff herein pecuniar-y harmless by reason of his obligations on said notes and actions brought by the said Head on said notes, and which actions culminated in the aforesaid judgments rendered by the Circuit Court for Kenosha County, Wisconsin, and the plaintiff

herein was sued by the said Head on the 24th day of August, 1900, in the Superior Court for Fairfield County, State of Connecticut, on said two judgments rendered by said Circuit Court of Kenosha County, Wisconsin, as aforesaid, and judgment was rendered against the plaintiff herein and his mother Martha A. Selleck, by the Superior Court of Fairfield County, and the Supreme Court of Errors on appeal affirmed said Superior Court judgment and another judgment denying a petition for a new trial of the first Superior Court judgment, and the plaintiff herein on the second day of August, 1904, was obliged to and did pay, in satisfaction of said judgment of the Superior Court $5,278.47 and $114.45 costs, on appeals and petition for new trial amounting in the whole to the sum of $5,422.92.

8. The plaintiff herein at his sole expense defended said action brought by the Superior Court for Fairfield County, in good faith and upon the honest belief that he could establish that the defendant herein, Benjamin Selleck and the said Darius Selleck had either paid the said Head, said Wisconsin judgment or had purchased the same from the said Head, so that in either event
7 the said Head had parted with all legal or equitable interest in said Wisconsin judgments upon which said action *to* the Superior Court was brought and that judgment would be rendered against said Head and in favor of the defendants in said Superuor Court action, notwithstanding which defence however judgment was rendered as aforesaid against the plaintiff and his mother Martha A. Selleck and in favor of said Head.

9. The said Darius Selleck died at said Danbury on December —, 1903, and six months from the 4th day of January, 1904, *was* limited by the Court of Probate within and for the Probate District of Danbury for the presentation of claims against the estate.

10. On the 12th day of June, 1904, it was for the first time finally and judicially determined between the plaintiff herein and his mother Martha A. Selleck on the one side of the litigation, (which said litigation was in continuation of and in affirmance of said action brought by Head against the plaintiff herein and Martha A. Selleck to the Fairfield County Superior Court) that Benjamin Selleck the defendant herein and the said Darius Selleck in his life-time had not either paid or bought said Head's cause of action on either of said Wisconsin judgments, or on said former obligations of the plaintiff, his mother (Martha A. Selleck) and of his father (William B. Selleck) which they owed Head and Dan Head & Co. respectively on November 8, 1883 at the time the plaintiff sold and conveyed said personal property and his right, title and interest therein to the said Benjamin and Darius Selleck, and which said obligations were afterwards represented by the aforesaid judgments rendered in the Circuit Court of Kenosha County in the years 1884 and 1886 and afterwards by the judgment of the Superior Court for Fairfield County, Connecticut and the litigation in affirmance of said Superior Court judgment. And on said 12th day of June, 1904 the plaintiff for the first time knew that it

had been judicially determined that he and his mother the
8 said Martha A. Selleck still owed said obligations which they and the said William B. Selleck owed on November 8, 1883 and that the plaintiff and the said Martha A. Selleck had ever since owed continuously said obligations because the defendant Benjamin Selleck and the said Darius Selleck (whose estate is the other defendant herein) had not either paid and satisfied or purchased said obligations. And afterwards on the second day of July, 1904, and within the six months allowed by the Court of Probate for the District of Danbury for the presentation of claims against the estate of the said Darius Selleck the plaintiff herein made due presentation of his claim to Emma S. David described herein as the executrix of the last will of the said Darius Selleck, deceased, which said claim was for the purchase price of said personal property with interest thereon from the 8th day of November 1883, to-wit, for $3,862.75, with interest thereon from November 8, 1883, and also for the expenses of contesting said action in the Superior Court for Fairfield County, amounting in the whole to $16,152.56, which said claim and each item therein the said executrix on the 7th day of July 1904, disallowed and refused to pay and has ever since neglected and refused to pay.

11. On the 31st day of October, 1904 the plaintiff made another presentation of his claim to the executrix of the last will of the said Darius Selleck and which said second presentation was within four months after he made said payment of $5,422.92 to said Head on the second day of August, 1904, in payment of said Superior Court judgments and costs, which said claim the said executrix then and there and ever since refused to state whether she would allow or disallow and she neglected to pay, and ever since and now neglects and refuses to pay any part thereof.

12. From the time of the commencement of said actions against the plaintiff and his mother the said Martha A. Selleck and his father the said William B. Selleck, and which actions re-
9 sulted in said judgments rendered by the Circuit Court of Kenosha County, Wisconsin, as aforesaid or at any time, neither the defendant herein, the said Benjamin Selleck, nor the said Darius Selleck in his life-time ever repudiated to the plaintiff the trust and condition upon which they received said personal property and the title of the plaintiff herein thereto or their promise to indemnify the plaintiff, his mother and father from pecuniary loss as aforesaid, or ever informed the plaintiff that they had not paid and satisfied said obligations due from him and his father and mother as aforesaid, until 1902. Neither has defendant Benjamin Selleck, or Darius Selleck in his lifetime or his estate since his decease made any account or accounting to the plaintiff herein of said personal property and the title thereof, so conveyed by the plaintiff herein on said November 8, 1883 to the said Benjamin Selleck defendant herein, and the said Darius Selleck.

The plaintiff claims $17,000 damages.

10 And on the 2nd day of November, 1904, Messrs. De Forest & Klein of Bridgeport and Howard W. Taylor of Danbury, entered their appearance for the plaintiff.

And on the 25th day of April, 1905, Samuel Tweedy of Danbury, entered his appearance for the defendant.

And thereafter on the 24th day of May, 1905, the plaintiffs filed their substituted complaint in the words and figures following to wit:

11 In the Circuit Court of the United States, Second Circuit, District of Connecticut.

Case No. 564. Law.

ISAAC H. SELLECK
vs.
BENJAMIN SELLECK.

Substituted Complaint.

1. The plaintiff is a citizen of the State of Michigan, and the defendants are citizens of the State of Connecticut.

2. On and previous to November 8, 1883, the plaintiff herein and his mother, Martha A. Selleck, and his father William B. Selleck, then in full life, but since deceased, and all of them on said 8th day of November, 1883, residents of Pleasant Prairie, Kenosha County, Wisconsin, were legally indebted to Daniel Head of Kenosha, in said Kenosha County, State of Wisconsin, and to Dan Head & Co., a banking company of said Kenosha by certain notes, amounting in the whole to between $3,100 and $3,200.

3. On said November 8th, 1883, the plaintiff herein, in order to relieve himself, his father and his mother from any further liability on said notes to the said Head individually, and Dan Head & Co., assigned, transferred and made over all of his (the plaintiff's right, title claim, demand and interest in and to certain personal property, then owned and belonging to the plaintiff, and then claimed by the plaintiff to be owned and belonging to him and situated on certain farms in said Pleasant Prairie, to the defendant, Benjamin Selleck, herein and to Darius Selleck, then in full life, but since deceased, and defendant testate herein, and which said personal property on said November 8, 1883, was of greater value than the amount of the indebtedness to said Head and Head & Co., as aforesaid, and on the same day the plaintiff herein executed and delivered a bill of sale of said personal property to the said Benjamin Selleck and Darius Selleck and they both accepted said bill of sale, and
12 caused the same to be recorded pursuant to the laws of the State of Wisconsin on the records and took possession of said personal property.

4. The defendant Benjamin Selleck and the said Darius Selleck (now deceased) when they accepted said bill of sale and took possession of said property, and agreed among other things, to, and with the plaintiff, herein, that in consideration of said transfer, they would indemnify and save the plaintiff, his father and his mother pecuniarily harmless, by reason of the obligations of plaintiff, his

father and mother, on said notes, to Head individually and Dan Head & Co.

5. Afterwards two separate actions were brought on said notes in the name of Head, and judgments were rendered on said notes in each of said actions against the plaintiff and his mother, Martha A. Selleck, and his father William B. Selleck, by the Circuit Court of Kenosha County, State of Wisconsin.

6. The plaintiff herein was sued by the said Head on the 24th day of August 1900, in the Superior Court for Fairfield County, State of Connecticut, on said two judgments rendered by said Circuit Court of Kenosha County, Wisconsin, as aforesaid, and judgment was rendered against the plaintiff herein, and his mother, Martha A. Selleck, by the Superior Court for Fairfield County, and the Supreme Court of Errors on appeal affirmed said Superior Court Judgment, and another judgment by said Superior Court denying a petition for a new trial of the first Superior Court judgment, and afterwards on the second day of August, 1904, the defendant herein, Benjamin Selleck and the said Darius Selleck testate, (the other defendant herein) failed and neglected to save the plaintiff herein pecuniarily harmless, by reason of his obligations aforesaid to said Head and Head & Co. and the plaintiff herein on said August second, 1904, was compelled to pay and did pay in satisfaction of said judgment of the Superior Court, $5,278.47 and $114.45 costs, on appeals and petition for new trial amounting in the whole to the sum of $5,422.92.

13 7. The plaintiff herein at his sole expense defended said action brought by said Head to the Superior Court for Fairfield County, and the said appeal therefrom; and brought said petition for a new trial and appealed from the judgment thereon in good faith, and upon the honest belief that he could establish that the defendant herein, Benjamin Selleck and the said Darius Selleck, had either paid the said Head, said Wisconsin judgments, or had purchased the same or the debts upon which they were founded from the said Head, so that in either event the said Head had parted with all legal and equitable interest in said Wisconsin judgments upon which said action to the Superior Court was brought; and that judgment would be rendered against said Head and in favor of the defendants in said Superior Court action, notwithstanding which defense, however, judgment was rendered as aforesaid against the plaintiff and his mother, Martha A. Selleck, and in favor of said Head.

8. Plaintiff herein expended in good faith in the defense of said actions in the Superior Court and in prosecuting said action, for new trial and in the two appeals to the Supreme Court of Errors, a large sum, towit, $2,500.

9. The said Darius Selleck died at said Danbury, on December 18, 1903, leaving a last will and appointing defendant, Emma S. David sole executrix thereof, which said will was proved and approved by the Probate Court for the District of Danbury on the fourth day of January 1904, and the said Emma S. David duly ac-

cepted said trust and qualified as executrix and is now acting as such executrix under said will.

10. On the 31st day of October 1904, the plaintiff made presentation of his claim to the executrix of the last will of the said Darius Selleck, for the payment of said $5,422.92, which he paid under compulsion to said Head on the second day of August 1904, as aforesaid, and also the further sum of $2,500 expended in the
14 defense of said action as aforesaid, and said executrix then and there neglected to pay the same ($7,922.92) or any part thereof.

11. On January 4, 1904 the said Danbury Probate Court entered an order limiting six (6) months from said date for the presentation of claims against said estate of said Darius Selleck.

12. The defendants herein have paid no part of the amount paid by plaintiff in satisfaction of said judgment to said Head and the said cost judgments and expenses in defending said action, although requested and demanded.

Plaintiff claims:—

1. Judgment for $8,500 damages.

PL'FF,
By DE FOREST & KLEIN,
H. W. TAYLOR,
His Att'ys.

15 And thereafter on the 3rd day of August, 1907, the defendants' answer to the substituted complaint was filed in the words and figures following to wit:

16 In the Circuit Court of the United States, District of Connecticut.

No. 564. Law.

ISAAC H. SELLECK
vs.
EMMA S. DAVID, Executrix, and BENJAMIN SELLECK.

Answer to the Substituted Complaint.

First Defense.

1. As to paragraph 1 the defendants have no knowledge or information as to the citizenship of the plaintiff, and leave him to proof thereof. They admit that the defendants are citizens of the State of Connecticut.

2. Paragraph 2 is admitted.

3. Paragraph 3 is admitted, except that the defendants deny that plaintiff had any right, title or interest in and to said personal property.

4. Paragraph 4 is denied.

5. Paragraph 5 is admitted.

6. Paragraph 6 is admitted.
7. Paragraphs 7 and 8 are denied.
8. Paragraphs 9, 10, 11 and 12 are admitted.

Second Defense.

1. The right of action described in said complaint did not accrue within six years next before the institution of said suit.

17

Third Defense.

1. Prior to said November 8th, 1883, the plaintiff's father, William B. Selleck, was indebted to Benjamin Selleck and to Darius Selleck, then in life, in a large amount, to-wit, greatly in excess of the sum of thirty-five hundred dollars ($3,500.00) and said bill of sale conveying the plaintiff's alleged interest in said personal property was made by the plaintiff for the purpose of conveniently enabling the said Benjamin and Darius Selleck to sell said personal property at auction to satisfy a portion of said indebtedness. .

Fourth Defense.

1. On or about the 24th day of August, 1900, Daniel Head brought suit as alleged in paragraph 6 of the amended complaint against the plaintiff, in the Superior Court for the State of Connecticut, in Fairfield County, to recover on said two judgments rendered in the State of Wisconsin in 1884, referred to in paragraphs 5 and 6 of said complaint. The defendants in said action alleged and offered testimony to prove that said Darius and Benjamin Selleck had agreed as alleged in paragraph 4 of the amended complaint to save the plaintiff harmless and to take care of the notes referred to in paragraph 2 of said complaint, out of the proceeds of the sale of said personal property, or otherwise; and were by said agreement obligated to pay said Wisconsin judgments, if they had not already been paid; and further alleged and offered testimony to prove that Darius and Benjamin Selleck, pursuant to said agreement, had, prior to said August 24, 1900, paid or otherwise satisfied said Wisconsin judgments referred to in paragraphs 5 and 6 of said complaint, and that said Benjamin and Darius Selleck, notwithstanding such payment or satisfaction, were fraudulently conspiring with said Head to compel the said Isaac H. Selleck to pay said judgments, in violation of their said agreement to hold the said Isaac H. Selleck harmless.

18

2. Said Darius and Benjamin Selleck and the plaintiff herein were present in said Court at the trial of said cause in the Superior Court, and testified as witnesses therein; and after due consideration it was by said Court found and determined that neither the said Darius nor Benjamin Selleck agreed with the plaintiff, Isaac H. Selleck, to pay said notes referred to in paragraph 2 of the substituted complaint in this action from said personal property, or the proceeds of the sale thereof, or from any source or in any way or manner, and that said Darius and Benjamin Selleck were not bound,

as against the plaintiff, to satisfy the judgments founded on said notes, and had not conspired with the plaintiff Head in said action to compel said Isaac H. Selleck to pay said judgments notwithstanding such alleged agreement and obligation.

3. A copy of the record in said suit is hereto annexed.

DEFENDANTS,
By BRISTOL, STODDARD, BEACH & FISHER,
SAM'L TWEEDY, *Their Attorneys.*

August 1st, 1907.

[Endorsed:] No. 564. Ans. to substituted compl't. Copy.

19 And on the 27th day of April, 1911, John K. Beach, Esq., of New Haven, Connecticut, entered his appearance for the defendants.

And thereafter on the 2nd day of May, 1911, the plaintiff's reply to defendants' answer was filed in the words and figures following to-wit:

20 In the Circuit Court of the United States, Second Circuit, District of Connecticut.

Case No. 564. Law.

ISAAC H. SELLECK
vs.
EMMA S. DAVID, EXR., & BENJAMIN SELLECK.

Plaintiff's Reply.

Reply to Second Defense.

1. Plaintiff denies the truth of the matters contained in the second defense.

Reply to Third Defense.

1. Plaintiff denies the truth of the matters contained in the third defense.

Reply to Fourth Defense.

1. Plaintiff denies all of the matters contained in the fourth defense, except, (*a*) That Head brought an action on the Wisconsin judgments, to the Superior Court, State of Connecticut, (*b*) That the defendants in said Head case offered evidence to prove that said Wisconsin judgments had been paid, by Darius and Benjamin Selleck, and the plaintiff further alleges, in that connection, that the defendants in said case offered evidence tending to prove that if said Wisconsin judgments had not been paid by Darius and Benja-

min Selleck, that the same had been assigned by Head, to them, and that Head was not the owner of said judgments, (*c*) That Darius and Benjamin Selleck testified as witnesses in said Head case, but the plaintiff in this connection, further alleges that they were called by said Head, and were not asked by the Plaintiff, Head, or defendants, in said Head case, whether they had paid either of said judgments, or were the owners of either of said judgments, and (*d*) That the court found that said judgments had neither been paid by said Darius and Benjamin Selleck, or assigned to them, by Head, and that Head was the owner of both of said judgments.

PLAINTIFF,
By His Attorneys, DE FOREST & KLIEN &
H. W. TAYLOR.

21 And on the 4th day of March, 1912, the case was taken up for trial to the jury and the following jury was impanelled and sworn to try the case:

Louis A. Gates	H. Perkins Topliff
Charles H. Chapman	Thomas B. Howe
Earl G. Morgan	Charles Shiras Morris
Merton W. Hills	Charles S. Hyde
Frank A. Tracy	Frank E. Marwedel
John A. Paine	Willis H. Robinson

And thereupon the following evidence was given before and read to the jury:

(See stenographer's notes of evidence and trial incorporated in the bill of exceptions herein.)

At the close of the evidence, the Court said that he would hear no arguments—the facts presented showed that it was clearly a case to be passed upon by the Court and not by the jury and that it was clearly his duty to dismiss the suit for want of jurisdiction and that he did.

Whereupon it is found by the Court here this 4th day of June, 1912, that the Court is without jurisdiction and that therefore the suit is dismissed for want of jurisdiction.

And thereafter on the 24th day of October, 1912, a formal judgment in writing was passed and entered as follows, to-wit, as and for August 26th, 1912, which judgment is in the words and figures following:

22 United States District Court, District of Connecticut.

At Law. No. 564.

ISAAC H. SELLECK, Alleged in the Complaint to be of Menominee, Michigan, and Henry A. Gilbert, Administrator, of Bethel, Connecticut, with the Will Annexed of said Isaac H. Selleck, Deceased,

versus

EMMA S. DAVID, of Danbury, Connecticut, as Administratrix with the Will Annexed of Darius Selleck, Late of said Danbury, and Benjamin S. Selleck, of Ridgefield, Connecticut, and Robert L. Selleck, of Syracuse, in the County of Onondaga and State of New York, as Executors of the Last Will and Testament of said Benjamin Selleck, Deceased.

Judgment.

This action, by writ and complaint, claiming seventeen thousand dollars ($17,000.00) damages, came to the Circuit Court of the United States, for the District of Connecticut, on the fourth Tuesday of April, 1905, when the defendants, Emma S. David, administratrix, and Benjamin Selleck, then in life appeared; and thence to the 24th day of May, 1905, when the plaintiff amended his complaint, as on file, and filed substituted complaint, as on file, claiming eight thousand five hundred dollars ($8,500.00) damages, and thence to the first day of August, 1907, when the defendants, Emma S. David, administratrix and Benjamin Selleck, then in life, filed their answer to said substituted complaint, as on file, and thence to the 20th day of August, 1907, when the plaintiff filed a motion to strike out a paper claiming to be made an exhibit to the fourth defense to said defendants' answer, and also tendered his replies to said

23 Answer of the defendants, which replies were then and there received by the Clerk of this Court, unto his custody, on said 20th day of August, 1907, and retained by him; and thence to the 21st day of November, 1910, when the death of the said Benjamin Selleck on September 8th, 1910, having been suggested on the record, a scire facias or citation to Benjamin Selleck of Ridgefield, Connecticut, and Robert L. Selleck of Syracuse, New York, executors of the last will of said Benjamin Selleck, deceased, was issued out of this Court, returnable to the first Monday of December, 1910, and thence to the 29th day of December, 1910, when the said Benjamin S. Selleck, and Robert L. Selleck, executors of the said Benjamin Selleck, appeared and adopted the answer filed by the defendant, Benjamin Selleck in his life time, jointly with the said Emma S. David, administratrix, as appears by the answer of said executors to said scire facias, as on file, and thence to the 27th day of April, 1911, when the defendants filed their motion to dismiss said suit for want of jurisdiction, and thence to the 2nd day of May, 1911, when the court ordered and directed that said defendant's answer, be ex-

punged from the pleadings, and that the replies of the plaintiff, in the custody of the clerk of this court, since the 20th day of August, 1907, be filed, as a part of the pleadings, in this action, and thereupon said replies were filed, and thence to the 5th day of October, 1911, when the defendants filed another motion to dismiss the suit for want of jurisdiction, and thence to the 6th day of October, 1911, when the plaintiff filed a motion to strike said last motion from the files; and thence to the first day of January, 1912, when said action was, pursuant to the statute, transferred to this court; and thence to the 8th day of May, 1912, when the plaintiff, Isaac H. Selleck, having died, Henry A. Gilbert of Bethel, Connecticut, administrator with the will annexed, of said Isaac H. Selleck, entered to
24 prosecute, as on file, and thence to the present day, when the plaintiff amended his writ as on file, when the parties were at issue to the jury, on the complaint and answer and replies, and after the impanelling of the jury, as aforesaid, the Court directed that the trial of said action, should proceed, by the parties introducing their evidence under the issue of the first paragraph of the substituted complaint, alleging the diverse citizenship of the plaintiff and defendants, respectively, before the parties should be heard and the evidence presented on the other allegations in said substituted complaint, upon which issues were closed, and the parties having presented their evidence on the allegations of paragraph 1, of the substituted complaint, alleging diverse citizenship, the court was of the opinion, that the plaintiff was a citizen of the State of Connecticut, at the time of the commencement of this action, and that the defendants were also citizens of the State of Connecticut, and that this Court has not jurisdiction of this action, and ordered that this action be dismissed upon the sole ground of the want of jurisdiction by this Court to hear and determine the same on account of the want of diverse citizenship and that the jury be dismissed.

Whereupon, it is adjudged that this action, be and the same is hereby dismissed, pursuant to the Act of Congress, in such cases made and provided, and that the defendants recover of the plaintiff their costs taxed at $80.80, and that execution issue therefor.

By the Court.

Attest:

E. E. MARVIN, *Clerk.*

Dated at Hartford, this 24th day of October, A. D. 1912, as and for August 26, 1912, nunc pro tunc.

25 And thereafter on the 19th day of October, 1912, the time for presenting the same having been duly extended by order of Court from time to time the following bill of exceptions was presented, allowed and ordered to be recorded in the words and figures following, to wit:

26 *Bill of Exceptions.*

United States District Court, District of Connecticut, May Term, 1912.

ISAAC H. SELLECK
vs.
BENJAMIN SELLECK et al.

Be it known that on the 17th day of July, 1907, the plaintiff obtained an order that the defendants and each of them on or before the 1st day of August next, (1907) file their Answer, to said substituted complaint, and that on August 3rd, 1907, by consent of plaintiff, the defendants filed their Answer, containing four separate defenses. Said Fourth defense setting up in bar the prior action of Head v. Selleck, and concluding in the third and last paragraph to said fourth defense, with the following words:

"A copy of the record in said suit is hereto annexed".

All of which more fully appears by said Answer.

That on the 20th day of August 1907, the plaintiff delivered into the custody of the clerk of the court, his Replies to said Answer and a duplicate thereof to the defendants, which closed the issues upon all of the allegations except said third or last paragraph of said fourth defense, and as to said third or last paragraph of said fourth defense the plaintiff at the same time (August 20, 1907) filed a motion to strike out the same, which motion was afterwards granted by order of court, May 2, 1911. And the court further directed on May 2nd 1907, that "The Reply to the Answer as it will then stand", i. e. Answer with the 3rd or last paragraph stricken out, and "which Reply has been for a long time in the custody of the clerk, be at once placed on file", and that the Reply was at once placed on file.

27 Be it further known that on the 27th day of April, 1911, the defendants filed the motion to dismiss this action, alleging that plaintiff was not a citizen of Michigan, at the commencement thereof, but was a citizen of Connecticut, and the plaintiff orally opposed said motion, on the day it was so presented, to this Court, in term time, and immediately thereafter, the court adjourned the jury term and that subsequently towit, on the 5th day of October 1911, another motion to dismiss was filed by defendants, as appears by Exhibit A hereto annexed and made a part of this Bill of Exceptions, and thereupon the plaintiff filed October 7, 1911, a motion of which Exhibit B, is a copy, for an order striking from the files said motions of the defendants to dismiss said action, upon all of said three motions, the court took no action, or passed any order.

Be it further known that on the trial of the foregoing the following proceedings were had.

A Jury was duly impanelled, and sworn; the substituted complaint, answer, and reply were read.

United States District Court, District of Connecticut, Hartford, Conn., June 4th, 1912.

ISAAC H. SELLECK
vs.
BENJAMIN SELLECK et al.

Before Honorable James P. Platt and a Jury.

Appearances:

Mr. H. W. Taylor, for Plaintiff.
Mr. Noble E. Pierce for Plaintiff.
Mr. A. T. Bates for Defendants.
Mr. John K. Beach for Defendants.

Robert A. Winslow, Jr., sworn as stenographer by the Clerk.

28 Mr. BEACH: I desire to call Your Honor's attention again to the fact that there is a very serious question as to the citizenship of the plaintiff, and at the proper time we hope Your Honor will receive some suggestions from counsel as to the propriety of trying that question first.

The COURT: I assume, without any suggestions, that that is the original question. We will settle the question of jurisdiction before we go at anything else.

The COURT: I suppose the jury understand that the plaintiff has died, and that his executor is entered to prosecute the case; you understand that, I suppose. (How many of the rest of us will die during the process I cannot tell you.) Henry A. Gilbert represents the plaintiff's estate, and is here to prosecute the case.

Mr. PIERCE: I understand Your Honor would like us to exhaust our testimony, on the subject of the citizenship of the plaintiff before going into the rest of it. With that in view I will read parts of Mr. Selleck's deposition. Shortly before the plaintiff's death, the plaintiff's deposition was taken. I will give your Honor the originals. I have an office copy to read from.

The COURT: I think, Gentlemen of the Jury, you probably understand that the first allegation of this complaint, is that the plaintiff is a citizen of the state of Michigan; defendants of the state of Connecticut—ti is admitted that they are citizens of Connecticut but they leave the plaintiff to his proof as to whether the plaintiff was a citizen of the state of Michigan. And my jurisdiction in this court depends upon the diversity of the citizenship, at the time the suit was brought. Therefore, I am going to listen to testimony on the question whether the plaintiff was a citizen of the state of Michigan, at the time the suit was brought; and Mr. Pierce is going to read from the deposition taken.

What page are you going to read from, Mr. Pierce?

Mr. PIERCE: I am going to read from the beginning.

29 The COURT: When was it taken?

Mr. PIERCE: Do you know, Mr. Taylor? This don't show the date.

Mr. TAYLOR: It was taken in April. It was delayed at Mr. Beach's request—April, I think 1911.

The COURT: Is that right, Mr. Beach?

Mr. TAYLOR: All formalities were delayed; we waited until he came back, he was off on a vacation.

Mr. BEACH: 22nd day of April, 1911.

The COURT: I find it at the end—the notary certifies it that Mr. Selleck appeared on the 22nd day of April, and signed the stenographer's notes.

Deposition of Isaac H. Selleck read by counsel:

Direct examination read by Mr. H. W. Taylor.

(Reading of caption waived.)

30 Q. 1. Are you the plaintiff in this case?

A. I am, sir.

Q. 2. What is your age?

A. My age is 63.

Q. 3. You are described in the papers here as Menominee, Michigan?

A. Yes sir.

Q. 4. Please state where your residence is?

A. In Menominee, Michigan.

Q. 5. Will you please state when you commenced your residence there?

A. In 1885, I think.

Q. 1. Will you please state whether you have been a voter there?

A. Yes sir, I have been a voter there. I was elected supervisor of my ward.

Q. 2. Did you do jury duty there?

A. I did.

Q. 3. Have you voted anywhere else?

A. No sir, I never did, never voted here or anywhere else.

Q. 4. Please state whether or no you still retain your residence in Menominee?

A. I do.

Q. 5. Please state when your uncle Jarvis Selleck died, about when?

A. In 1890 in February.

Q. 6. Do you mean 1890 or 1900; everybody seems to get those mixed.

A. 1900.

Q. 7. What date, do you remember?

A. 27th of February.

Q. 8. Were you one of the joint heirs of his estate?

A. I was.

Q. 9. Half heir?

A. I was, with my uncle Darius.

Q. 10. With your uncle Darius?

A. Yes.

Q. 11. After Jarvis Selleck's death did you come out here to Danbury and Ridgefield; to Connecticut?

A. Yes, I did, I came down here to look after his estate.

31 Q. 12. How old is your mother?

A. She is 89 years old last February.

Q. 13. And what was her maiden name, Mr. Selleck?

A. Martha.

Q. 14. Not the first name, but her maiden name?

A. Meeker. She was born down here at West Redding.

Q. 1. Will you please state whether or no after you inherited this property from your uncle Jarvis your mother made any request of you in relation to coming back here to Connecticut for a while?

A. Why, I had to come down here to look after the estate, but I brought my mother and my wife down here, and they was to stay here, until I settled it up, but the litigation I had with Mr. Head held me here.

Q. 2. It seems that that litigation was commenced on the 24th of August 1900?

A. Yes sir.

Q. 3. That is in the suit by Mr. Head against you and your mother?

A. Yes sir.

Q. 4. In the Superior Court for Fairfield County?

A. Yes.

Q. 5. But that was terminated on August 2nd 1904 by the payment of the judgment?

A. Yes sir.

Q. 6. And in November 1904 you brought the present action?

A. Yes sir.

Q. 7. Has the pendency of those actions kept you here during the period of time that you have been here?

(Objected to as leading.)

A. They have kept me here, and selling my property.

Q. 8. What has kept you here during the period of time that you have been down here?

A. This litigation of Mr. Head's and this bringing suit against Darius and Benjamin Selleck.

Q. 1. You added something about getting rid of your property?

A. And getting rid of my property here.

Q. 2. Will you please state whether Mrs. Selleck, your wife, is a western woman, or not?

A. She is. I didn't expect to be here more than 3 years.

32 Cross-examination on the part of the defendant by Mr. J. K. BEACH:

Q. 1. Mr. Selleck, when was it you moved east from Menominee?

A. I came down here in 1900.

Q. 2. What date?

A. I arrived here, I think, the 29th of February. It was right after my Uncle Jarvis died. I got on the cars the same day and came right on.

Q. 3. How long had you been living in Menominee before your uncle died?

A. I lived there 10 or 12 years.

Q. 4. Did you have a house there?

A. Yes sir.

Q. 5. Who lived in it with you?

A. My wife, and then my mother and my father came there to live with me.

Q. 6. Did they continue to live with you up to the time of your uncle's death?

A. Yes sir. My father lived with me until he died. My mother lived with me all the time, she came down here.

Q. 7. When did your father die?

A. In '88, I think.

Q. 8. It was before you came East?

A. Yes sir.

Q. 9. When you came east, who did you bring with you?

A. I came down alone at first. I was down here until the next June. I went back to Menominee and lived there and staid there with my family until along in February, and then I came down here.

Q. 10. February 1905?

A. Oh no, February 1901.

Q. 11. I mean 1901?

A. Yes, and then after that my mother and my wife came down here, and we kept house here.

Q. 1. Then the fact is, that in the early part of 1901 you and your wife and your mother came here together?

A. No, they came down alone. I came down along in February alone to look after my Uncle Jarvis' property that he had left me.

Q. 2. Then you went back there?

A. No. Then my mother and my wife came down in the fall—in the summer.

Q. 3. In the fall or summer of 1901?

A. Yes.

Q. 4. What became of the house that you had been living in in Menominee?

A. When I first moved down here, my Uncle Jarvis left
33 me this property. I staid here and my family staid out there, and wife's relatives all lived there and she didn't want to be down here.

Q. 5. What became of the house that you used to live in in Menominee?

A. After I had been down here I didn't want to leave my property out there to be rented and be all tore to pieces, the house, and I told my wife that if she could sell it to sell it, and a party came there and bought it.

Q. 6. When was that?

A. That was in 1902, I think.

Q. 7. Was that before or after your wife and mother came here?

A. 1901? That was before my mother and my wife came here.

Q. 1. So that the home that you had lived in was sold before your wife and mother left Menominee?

A. Yes sir.

Q. 2. Where did you first stay when your wife and your mother came down to Danbury?

A. I staid down to Bethel with my cousin, second cousin. We all went there and staid, and we were there probably—I had this house rented, and I agreed to let the man have it until I wanted to move in that fall.

Q. 3. How long did you stay with your second cousin in Bethel, I mean you and your wife and your mother?

A. Oh, I staid there from August until October, the latter part.

Q. 4. August 1901?

A. Yes sir.

Q. 5. Until October 1901?

A. Yes.

Q. 6. Then where did you move?

A. Lived here. I moved in here with my family.

Q. 7. "Moved in here," meaning the house you are now living in?

A. Yes.

Q. 8. Who owns it?

A. I do.

Q. 9. How long have you owned it?

A. I have owned it about ten years.

Q. 10. Since 1901?

A. Yes.

Q. 11. Have you ever lived anywhere else in Danbury, excepting this house?

A. When I first came down—my mother and my wife first
34 came down, I lived down in Bethel.

Q. 1. I am speaking of Danbury, now?

A. Oh no, I never lived anywhere else.

Q. 2. How long is it, since you have been back to Menominee?

A. I went back there after the Dan Head suit, I can't very well remember dates, that was in 1904, as I remember.

Q. 3. Who went back with you; anybody?

A. Mr. Taylor, H. W. Taylor my attorney.

Q. 4. Went back there with reference to looking up testimony in regard to your litigation, didn't you?

A. Yes.

Q. 5. How long did you stay there?

A. Oh, I was there I guess a couple of weeks.

Q. 6. Engaged in looking up matters connected with the Head suit?

A. Yes sir.

Q. 7. Did you then come back here?

A. I did.

Q. 8. And have you been to Menominee, since then?

A. No sir.

Q. 9. Have you been to Michigan more than once since 1901?

A. Yes sir—since 1901?

Q. 10. —.

A. I don't think I did, I only went once with my attorney.

Q. 11. Only once, and then for two weeks?

A. Yes, a little over two weeks.

Q. 12. Are you sure you went back to Menominee, then, or was it Kenosha, you went to?

A. Kenosha, Kenosha, I get them places mixed. I lived in both of them, and I get them confused. I don't wish to be misunderstood.

Q. 1. Kenosha is in Wisconsin, isn't it?

A. Yes.

Q. 2. Not in Michigan?

A. No sir.

Q. 3. Then have you been back to Menominee, Michigan, since 1901?

A. Yes, all the time, except I went out with my attorney, I have lived here.

Q. 4. I say have you been to Menominee, Michigan, since the summer of 1901?

A. No, no, no, I haven't.

35 Q. 5. What, if any, property have you got out in Michigan, now?

A. I have a desk out there that I left with my brother-in-law.

Q. 6. Anything else?

A. I think I have a little vacant land out there; I know I have.

Q. 7. Do you pay taxes on it?

A. Oh, yes—no, I am pretty sure that I have.

Q. 8. You ought to know whether you are paying taxes on it or not?

A. Oh, no.

Q. 9. What?

A. No, I haven't any other property out there, come to think, I thought I had, and left it with my brother-in-law to look after.

Q. 10. So that this desk that you left with your brother-in-law to look after only property that you now have in Michigan?

A. Yes, that is all.

Q. 1. Well, how long is it since you owned any other property in Michigan than this desk?

A. Oh, I made a mistake. Since then I had the homestead up there, and I didn't pay taxes on it, and I sold it to a man, a man who was on here, and wanted to know how much I would take for it, but I didn't pay taxes on it.

Q. 2. What homestead are you talking about now?

A. The homestead out in Michigan, the one that my father took up.

Q. 3. In Menominee, Michigan?

A. 7 acres.

Q. 4. Menominee, Michigan?

Q. About 200 miles north of there.
Q. 5. About 200 miles north of Menominee?
A. Yes, sir.
Q. 6. Did you ever live there?
A. Yes, I lived there 2 years and a half.
Q. 7. How long ago?
A. I can't tell the date; it was after I moved away from Kenosha.
Q. 8. It was after 1883?
A. Oh, it was after '83.
Q. 9. It was after '83 and before you went to live in Menominee, wasn't it?
A. No, from Menominee, I went up on the homestead.
Q. 10. Staid there 2 years and then came back to Menominee?
A. 2 years and a half, and came back to Menominee, the same place. I built a house there before that.
Q. 1. When was it that you came back to Menominee?
A. From the homestead.
36 Q. 2. Yes.
A. I think it was in 1886.
Q. 3. In 1886?
A. I think so.
Q. 4. How long is it since you have been back to what you call the homestead?
A. Oh, I haven't been back there in years, some 20 years.
Q. 5. What other relatives have you got except your own wife and mother, Mr. Selleck?
A. I have a cousin Charles Meeker, C. D. Meeker in Bethel.
Q. 6. He has a house of his own, I suppose?
A. Yes, he lives on a farm.
Q. 7. You have no other immediate family except your wife and mother?
A. No, I have not.
Q. 8. Do I understand you to say that you claim your home is in Menominee?
A. Yes, sir.
Q. 9. Why do you claim that?
A. I didn't except to be down here over 3 years.
Q. 10. But I am asking you why do you claim that your home is in Menominee when the only property that you have got there is a desk and you haven't been back there——
A. (Interrupting.) I left that desk there, and I expected to go back there. I do expect to go back. I am going back as soon as I dispose of this property in Danbury, I calculate to go back.
Q. 1. What property are you talking about now?
A. This property my Uncle Jarvis left.
Q. 2. What property?
A. Well, there is this house and lot, that house and lot over there, and these three lots. I sold two of them (pointing) and a house and lot down on New Street, and my farm here in Ridgefield.
Q. 3. Where are you expecting to go in Menominee?
A. I always liked it there.

Q. 4. Where are you expecting to go?
A. When?
Q. 5. Where, to what house are you expecting to go when you go back?
A. I expect to build a house there.
Q. 6. You haven't got any place there that you are now expecting to go to?
A. No, sir.
Q. 7. As I understand you, you own other real estate besides this house in the city of Danbury?
37 A. Yes. I own this property out here, except the two lots on the corner that I sold here six months ago, and I own this house here, and the three lots I own, and I own the New Street house, and lot and I rent it, a double house, and I own the farm down here in Ridgefield County.
Q. 8. How long have you owned all that property?
A. 10 years.
Q. 9. That is, since 1901?
A. Yes.
Q. 1. Since the death of your uncle?
A. 11 years.
Q. 2. Since the death of your uncle?
A. Yes, sir, 1900.
Q. 3. Have you got any other residence anywhere except in Danbury?

Mr. TAYLOR: I object to that.

Q. 4. I mean a dwelling house?
A. Shall I answer it?
Q. 5. Of course you will answer it?
A. No, no.
Q. 6. What has become of that desk that you left with your brother-in-law?
A. He has it.
Q. 7. How do you know he has it?
A. He testified in the Head case that he had it.
Q. 8. When was his testimony in the Head case taken?
A. In 1884,—1894.

Mr. BEACH: Is that right?
Mr. TAYLOR: He didn't testify in that case; he testified in this.
The WITNESS: Oh no, I misunderstood you.

Q. 9. What is it you say?
A. What is the question.
Q. 10. I asked you what became of that desk?
A. He has it, I suppose.
Q. 11. You suppose so because he testified to it?
A. Yes sir.
Q. 12. How do you know he testified to it?
A. Well, I heard so through my attorney.
Q. 13. How many times have you heard anything at all about

this desk until your attorney told you that your brother-in-law testified that he still had it?

A. How many times have I ever what?

Q. 1. Ever heard of it?

A. I don't know that I ever did. I don't remember. I don't know.

38 Redirect examination of ISAAC H. SELLECK, read by Mr. H. W. TAYLOR:

Q. 1. Mr. Selleck, why did you leave the desk at Menominee when you came down here?

A. I left the desk there to hold my residence there. I didn't expect to be down here over three years any way. I wanted to go back there.

Q. 2. Several questions have been put to you on your cross-examination, showing that it is now ten years since you left Menominee?

A. Yes.

Q. 3. But the admitted facts in the case show that you had been sued about a year before you came down here to Danbury, that is, a suit had been brought in August 1900 and your family came here on the following fall of 1901?

A. Yes sir.

Q. 4. Please state in that connection what your expectations were about going back to Menominee in reference to the termination of that Head case?

A. I expected to go back there. My wife's relatives lived there, and we all liked it there in Menominee, and I was acquainted.

Q. 5. Now you have testified on cross-examination, using the word building as dwelling house in response to a question, whether you had any other dwelling house than the one in which this deposition is being taken that was the substance of it, and thereupon you answere- that you had other houses here in Danbury?

A. Yes.

Q. 1. Are they also dwelling houses?

A. Yes sir.

Q. 2. Please tell us where they are?

A. One is out here in Park Avenue 16 Park Avenue, a double house; the other one is down in New Street next to the shirt factory a double house.

Q. 3. If we attach any particular importance to the word dwelling house, do I understand you correctly that you have three dwelling houses here in Danbury, or own them?

A. I do.

Q. 4. Is there a dwelling house on the farm in Ridgefield which you are the owner of?

A. Yes, dwelling house and barn.

39 Q. 5. Please state whether on and prior to the date that you moved down here from Menominee for the temporary purposes which you have stated, you had exercised your elective franchise in Menominee and had been a voter?

A. Yes sir.

Q. 6. Continuously in Menominee?

A. Yes, right along while I was there. Well, there was probably 2 years and a half I was gone that I didn't vote there.

Q. 7. Where did you vote then?

A. I didn't vote.

Q. 1. Was that when you were in Washington State?

A. In Washington I voted out there, but I didn't vote when I was up north on the homestead, I was up there in the woods.

Q. 2. That is way back in '86. I mean after you cleared up this large sum of money from the Diamond Match Company and came there and had built this house, or bought one in Menominee, and lived there with your wife and mother, did you vote regular?

A. I voted there and was elected supervisor of the ward, and served on the jury.

Q. 3. You have been down here to Connecticut since 1901 expecting, as I understand you, to have these things cleaned up?

A. Yes sir.

Q. 4. You want to dispose of this property?

A. Yes.

Q. 5. Please state whether at the time you came here a large part of your holdings in Connecticut was real estate?

A. Yes sir.

Q. 6. Please state whether or no the value of real estate at that time was low?

A. It was very low.

Q. 7. Did you hold it for the purpose of a rise?

A. Yes sir, after I become acquainted with the values of property, I kept it.

Q. 8. Please state whether or no what has been the reason that you have refrained from the exercise of your voter's privilege, elective franchise, since you have been in Connecticut?

A. My residence in Menominee.

Q. 1. Have you described yourself in papers and documents as of Menominee, Michigan?

A. I have always.

Q. 2. Mr. Selleck, in this present lawsuit will you please state whether it has been continued 3 or 4 times at the request of the defendants?

A. It has.

40 The COURT: That ends at page 63; that was the answer to question 2 on page 63. Mr. Beach, did you take it up again later?

Mr. BEACH: No, I think that is all.

41 Mrs. CHARLOTTE C. SELLECK sworn by the Clerk.

Examined by Mr. PIERCE:

The CLERK: Your full name, please?

A. Mrs. Charlotte C. Selleck.

Q. You are the widow of Mr. Isaac H. Selleck?

A. Yes sir.
Q. When were you married, to him?
A. I was married September 7th, 1869.
Mr. TAYLOR: Raise your voice a little, Mrs. Selleck, so that the Court and the jurymen can hear.
Q. September 1869?
A. Yes, sir.
Q. And where had been your home before you were married?
A. In Wisconsin.
Q. And you lived with your husband from that time until the time of his death?
A. Yes sir.
Q. Which, it has been testified here——
A. Yes sir.
Q. —about six months ago?
A. Yes sir.
Q. Now, when did you and your husband move to Menominee?
A. In 1885.
Q. 1885. Where did you move from when you went there?
A. To Menominee? We moved from Kenosha, Wisconsin.
Q. And how far was it between Kenosha and Menominee?
A. About 280 miles, I think, they call it; somewhere between 200 and 300 miles; I cannot just tell.
Q. And when did you come to Connecticut?
A. We came to Connecticut in August 1901.
Q. 1901?
A. I believe.
Q. And prior to your coming to Connecticut, I ask you whether or not you had lived continuously in Menominee from the time you went there?
A. Why, except about two years and a half, when we were in Ontonagon County—that is in Michigan—on a homestead.
Q. Do you remember (it is not important—the exact date, but approximately the date) when you went up the state to live on this homestead for two years and a half?
A. In the Fall of 1886.
Q. Then you——
A. No; it was in the fall of 1887.
Q. Then you went up there, approximately, after you had been in Menominee two years—you went up on this homestead?
42 A. Yes sir.
Q. And after staying there two years and a half you came back to Menominee?
A. We came back to Menominee; yes.
Q. And whether or not a time when you spent some time in the state of Washington?
A. About eight months, I was in Washington; in the state of Washington.
The COURT: When was that, Mrs. Selleck?
A. In 1891 or '92, I think. I have forgotten which is it—'91-'92 I think it was; 1892 I think.

The COURT: How long did you stay there?

A. I was there eight months.

The COURT: How long was your husband out there?

A. He was there about ten months; he was there about two months before I went out.

The COURT: He testified in his deposition that he voted out there.

Mr. BEACH: I think not.

Mr. TAYLOR: No, in Menominee.

Mr. PIERCE: My recollection is that he did.

The COURT: That is my distinct recollection. I don't want any misunderstanding about it.

Mr. PIERCE: The opportunity to vote is pretty easy in some of those western states, Your Honor.

The COURT: Very true; and it does not necessarily settle the issue we have here this minute.

Mr. PIERCE: It is my recollection that he didn't vote ever on the homestead proposition.

The COURT: I think you would find it.

Mr. TAYLOR: And if such information entered in his testimony that is, he didn't change it at all later on?

The COURT: That is the way I understand it, I don't know.

The COURT: Do you know whether or not he did vote out there in Washington?

43 A. I don't know positively; I hardly think so; I couldn't say positively.

The COURT: But you cannot say either way. Did you live there—have a home?

A. We boarded with my sister. He went in September, and I went—he went in September or October, and I went the following January.

Q. Did he come back with you when you came back to Menominee?

A. Yes sir.

Q. And you boarded with your sister in the state of Washington?

A. In the state of Washington, yes.

Q. And what, during your absence, did you do, if anything with regard to your home in Menominee?

A. While we were west?

Q. Yes.

A. We left it; closed the house up.

Q. And left it there without moving the furniture?

A. Left the household furniture in the house, yes.

The COURT: That was just a temporary trip out to the state of Washington, without any idea of settling.

A. We wasn't—we went out to see whether we would like it there; and then came back.

The COURT: Stayed a little while—left all your household things, and came back after a little while?

A. Yes sir.

Q. And that, as I understand you, is about ten years before the time when you came on here to Connecticut?

A. Why, I think it was—1881——

Q. 1891 or '2. You said you came to Connecticut in the fall of 1901?

Mr. BEACH: August.

Q. August! What time in 1901?

A. That we came back to Menominee?

Q. No. When you came to Connecticut?

A. We *came* here in August 1901.

Q. August 1901. From the time you came back from Washington you made your home continuously in Menominee, did you?

A. In Menominee; yes sir.

Q. And according to the dates that you gave us it is a matter of nine or *ten* years that you were there continuously.

A. Yes sir.

44 Q. Did your husband own this place in Menominee?

A. We owned it together. I bought the lot, and he put money in the house; we built the house and he put money in.

Q. And when did you build your house, before you went to the state of Washington or after?

A. Oh, yes; before we went up to the homesteads.

Q. Before you went up to the homesteads?

A. Yes, sir.

Q. What was your husband's business during that last ten years that you were in Menominee?

A. He was in the shoe business at one time; and then he wasn't doing very much of anything.

Q. So that he had no particular business at the time his uncle Jarvis died?

A. No; not at that time, not any particular business.

Q. I don't ask you for the names of the orders; but I ask you whether or not your husband belonged to any brotherhoods, fraternities or orders; and if so, how many there in Menominee?

A. He was a Mason——

Q. I beg your pardon, but please don't name them. I want to know the fact—how many different orders did he belong to?

A. Three.

Q. And did he hold office there?

A. Yes sir.

Q. Did he belong to a church?

A. To a church?

Q. Yes.

A. Yes.

Q. Yes?

A. Yes.

Q. What church?

A. First Presbyterian.

Q. And had been a member of that church for how many years?

A. I couldn't say how many years; not a great many; four or five.

Q. And you were also a member of that church?

A. Yes, sir.

Q. Again I don't ask you for names, but I ask you whether or not you yourself belonged to any orders?

A. No sir; no I didn't.

Q. No social orders?

A. Nothing.

Q. What was the occasion of your husband first coming to Connecticut?

A. Why his uncle Jarvis Selleck died.

45 Q. Had your husband ever lived in Connecticut, before that?

A. Why, he was born in Connecticut, West Reading; went west with his family when he was three or four years old.

Q. So that from the time he was three or four years old he hadn't been in Connecticut, until he was called here by the death of his uncle?

A. No; he hadn't lived here.

Q. Had he ever visited, as far as you know?

A. Yes he visited here.

Q. But he never lived here from the time he was three or four years old?

A. No, sir.

Q. When his uncle Jarvis died how soon did he start for Connecticut?

A. Why he started in about an hour after he got the telegram.

The COURT: Do you remember whether that was in February 1900?

A. It was 1900.

The COURT: In February?

A. Yes, I think it was in February. He came right on—yes—he got the telegram about 12 o'clock, and the train left there about one, nearly one o'clock; it was about an hour.

The COURT: That was in the Spring of 1900?

A. Yes.

The COURT: And then it was the fall of the following year that you came with your mother?

A. August; yes sir.

Q. And how long did your husband stay in Connecticut, that first time he came to attend the funeral?

A. He stayed there until June; he came home in June.

Q. He came back to Menominee?

A. To Menominee; to his home.

Q. In June?

A. Yes, sir.

Q. So that he went on on an hour's notice on account of his Uncle Jarvis's death, and remained as you say, until June?

A. Yes.

Q. Then he came back to Menominee?

A. Then he came back to Menominee to our home; yes, sir.

Q. And how long did he stay there?

A. He stayed there until the following January, I think, or February—and I can't remember just which—I think it was January, but I am not positive.

46 Q. And what then? Then did he come back to Connecticut?

A. Then he came back to Connecticut, yes.

Q. Now, what was said, if anything, by him when he came back to Connecticut on that occasion, January or February, 1901, about the length of time he was going to stay in Connecticut?

A. That he was going to stay?

Q. Yes.

A. He would not say how long he would stay away; said he would come back as soon as he could get matters settled up in Danbury.

Q. At the time that he came on here did you come with him?

A. No sir.

Q. How long was it before you came here?

A. I came in August; and he came, I think, in January or February.

Q. You say that you were a part owner of the house in Menominee?

A. Yes sir.

Q. What conversat*i*on or correspondence or arrangement did you have, if any, with your husband about the length of time that he was to stay east here?

A. That he was to stay?

Q. Yes; that you were all to stay?

A. He told me that if—I was very much opposed to coming here; I felt first I could not come on here—and he told me that we would not be here more than three years, and perhaps not that long.

Q. Anything else in that connection?

A. And he wrote me before he came home in June that he thought that we would have to move down to Danbury, and stay a while; that he couldn't get rid of the property; said it was clear down, wasn't bringing anything; and he couldn't sell it, and he didn't want to dispose of it without getting something what was near what it was worth. And so he made me that promise that if I would come down here that I would not need to be here, he didn't think, over three years; and that he could get things straightened around so we could go back—three years, more or less might be longer I didn't want to come and sacrifice what I had to leave.

47 Q. You liked living in Menominee?

A. Very much; I liked it the best; I had my own people there, and we thought a great deal of Menominee; I think a great deal of Menominee.

Q. You say your own people, your relatives?

A. I had relatives living there, yes; my mother had lived there a number of years and died there, died there after I went there, at my home.

Q. Did your husband have pleasant relations there?

A. Very, no connection nor relatives, he had very pleasant relations there, very pleasant, thought a great deal of the people there; and we had always calculated to make that our home.

Q. You first talked of coming on thus temporarily to Danbury, for I understand, that was on a visit in June. That is, your husband had come back home; he had been here from January to June, do I understand you, in 1901?

A. January or February; it was when his uncle died in February.

The COURT: February 1900.

Q. Did he go back after he came here the second time—did he go back to Menominee?

A. No sir.

Q. So that this was by correspondence?

A. Yes.

Q. Did he speak about your coming on?

A. After he came on here, no.

The COURT: At the time of the death of his uncle he came on in February, quickly?

A. Stayed until June that same year.

The COURT: And then he came here again in January?

A. Came here again in January yes.

Q. Now, did you go back between that time and the time you moved here?

A. No, no, he didn't.

Q. So that this conversation you speak of was when he was home?

A. After he came back the first time from here.

Q. Did you contemplate selling your home at all?

A. Not then, no, not until a few days—even after I had commenced to pack my goods to come, then I talked thought of selling.

48 Q. Now, tell us how that arose?

A. Why just happened a man knew that wanted to buy a place; and knew I was coming down here; came in and wanted to talk with me about it, and wanted to know if I would sell. And I told him that I hadn't thought very much about it; and he said, that he told me, he would like to buy, and made me an offer; and I sold it to him.

The COURT: Just before you started?

A. Just before I started yes sir.

The COURT: You came on with his mother?

A. With mother Selleck. And Mr. Selleck and I had talked about it; and he told me that we would have to move down here for a while. And I says, "What will I do with my home things, and furniture?" He says "We will rent it; you can rent the house furnished; but you can pack things and bring them with you if you wanted". And I told him that I would not loan the furniture, "Well", he says, "then you can do just as you are a mind to about it". And I had a chance to sell the place and I told it.

The COURT: That chance came after you had begun to pack?

A. After I had begun to pack my things; yes sir. The man bought it and he took some of my carpets and my stove and some other things, in the house—bought them. And he packed my things for me that day, and he moved right in.

The COURT: Did it stand in your name?

A. Yes sir.

The COURT: So that you could sell it without your husband's signature?

A. Yes; stood in my name; bought on a contract.

The COURT: Mr. Selleck, then, of course, knew nothing about it at the time you made the sale?

A. He didn't know when I made the sale.

The COURT: He knew you would make a sale if you had a chance?

A. He knew that I could if I wanted to.

The COURT: Was it before you started you sold it?

A. He knew that I didn't want to come on here.

49 The COURT: Then you came on with your mother and saw him, of course, when you got to Danbury?

A. I met him; he was at the train in Bethel.

The COURT: Did you tell him about having sold the place?

A. Yes sir, I had written him.

The COURT: That was the first——

A. I had written to him about selling it.

The COURT: I thought it was just as you started?

A. It was just when I was beginning to pack up.

The COURT: Then, you had written to him, and had his consent—he agreed to it by letter before you actually consummated the transaction?

A. Yes sir; he agreed to it.

The COURT: Before you made this arrangement to sell it you had some arrangement or partial arrangement to rent it?

A. Yes I had.

The COURT: And did you ever advertise it for sale or tell anybody?

A. Never did advertise it for sale; never tried to sell it; hadn't thought we could sell it; didn't want to sell it; but this man came over and made me an offer, and I thought we were coming down here, it might be over.

The COURT: Did you keep all Mr. Selleck's letters, Mrs. Selleck?

A. I did not.

The COURT: The letter which he wrote you about this property, you haven't that in your possession now?

A. No, I haven't. I generally look over my letters, all of them destroy them—I don't know—ever so often I destroy letters that I ought not to.

Q. You lived with—when you came here—temporarily, with some cousins down in Bethel?

A. Yes; cousins of Mr. Selleck.

Q. And this house that you just now live in was received by your husband from his uncle Jarvis?

A. Yes sir; we were boarding and Mr. Selleck's physician thought it was better for us to go to housekeeping because he was very bad with the diabetes and he had got to diet, and he said "You ought to be housekeeping in order that your wife can look after you and take care of you." So he says "We will fix up that place and go into it and stay there while we are here."

50

Q. Did you or not stay in that same place?

A. Same place; we are living there yet.

Q. Now, this suit was brought according to the dates, a matter of three years after the time, a little less than three years?

A. I think so. I know we had been living in Danbury some little time.

Q. It was brought in the fall of 1904 and you came here in August 1901?

A. Yes.

Q. A matter of three years and two months, I think. Now, up to the time this suit was brought had your husband ever changed his purpose to go back to Michigan?

Mr. BEACH: I object.

The COURT: I don't think that is a proper question, Mr. Pierce. If her husband ever made any statements to her indicating his purpose you have a right to ask her that. Of course she cannot assert——

Mr. PIERCE: I will withdraw the question. I recognize the justice of Your Honor's criticism.

Q. I will put it in that form, Mrs. Selleck. Mrs. Selleck, what if anything, had your husband said down to the time of the bringing of this suit about his purpose to return to Menominee, or his purpose to make his home in Danbury—anything upon that subject, anything that he said to you, we would like to have you state.

A. He had always told me that he intended——

The COURT: Never mind that. But he brought this suit in November, in the fall of 1904. Now, if he said anything to you indicating his purpose about where he intended to live, at or about that time, we would like to have you tell it?

51

A. He intended to live; intended to go back to Menominee.

The COURT: Did he say so?

A. Yes sir.

The COURT: When?

A. I couldn't tell you: just remember it; but he said it at that time and at all times; he has always said it to me; always it has been; always was talking that we should go back there, and that——

The COURT: That was in 1904?

A. What?

The COURT: That was in 1904?

A. 1904, yes.

The COURT: He was here when he died?

A. He died, here yes sir.

The COURT: Did he stay here from 1904?

A. Yes sir, could not get away from here; it was not his wish.

The COURT: He didn't carry out his purpose to go back from 1904 on to the present time, what kept him?

A. It was his property there in Danbury, and this law suit, this litigation that he——

Q. Will you state whether or not he had that property in the hands of several different dealers, all of his property for sale?

A. Yes, sir, he has had it; it has always been in the hands of dealers ever since he owned it; in the hands of real estate men for sale.

Q. All of his property?

A. He has tried to sell that property.

The COURT: The property that you live in?

A. Yes sir.

Mr. PIERCE: I suppose, Your Honor, it is a question of intention at the time the suit was brought.

The COURT: It was—that is the idea I had in mind; that is the reason I have been asking her if she can recollect any statement that he made about that time bearing on the intention. Of course, the fact that there has been other evidence simply has an indi-
52 rect bearing upon what his intention was; it is assuming backwards from what happened since, as having an effect upon what his intention was at that time; that is all.

Mr. PIERCE: The evidence that has transcpire- since in the shape of this lawsuit hanging on, etc.

Q. Has your husband ever bought any property there in Danbury since?

A. No, sir.

Q. He simply took the property that fell to him from his uncle and has been trying to sell it?

A. He simply took the property that fell to him from his uncle and has been trying to sell it.

Q. Including the house that you live in?

A. Yes, we would sell that.

Cross-examination by Mr. BEACH:

Q. Mrs. Selleck, Mr. Selleck testified in his deposition in regard to—speaking of the sale of your house in Menominee——

A. Yes.

Q. He says this, "What became of the house you used to live in in Menominee?" (Answer) "After I had been down here, I didn't want to leave my property out there to be rented." Did he ever tell you anything of that sort?

A. That he didn't want to leave it?

Q. That he didn't want to leave it to be rented?

A. Why; I was opposed to leaving the property there to be rented; didn't want to leave it there.

Q. And he says then, "I told my wife that if she could sell it to sell it." Did he tell you that?

A. I don't remember he told me any such thing, as that, because we had——

Q. You don't remember his telling you to sell it if you could get a party to take it?

A. Oh, no; I don't remember his telling me that.

Q. When you sold it what became of the household furniture that was in it?

A. There was some of it, the man took with the house; some of it I moved to Danbury, and I sold some of it.

53 Q. You sold some of it, to the party that bought the house?

A. Yes he took——

Q. What sort of articles did you sell to him?

A. Carpets, the stove one, two carpets; my cook stove; aw-ings, stair carpet; carpets on the floors; cook stove; aw-ings, and my garden house and some garden tools.

Q. What became of your household furniture?

A. What became of my household furniture—I brought some of it with me.

Q. Do you remember just what you brought with you, Mrs. Selleck?

A. I have got it now.

Q. It is the same furniture you have now?

A. Yes sir.

Q. And you said there was some other stuff that you sold to other people?

A. How?

Q. And you said there was some other stuff that you sold to other parties was there?

A. Some other furniture?

Q. Yes.

A. I sold some stoves to a dealer in Menominee.

Q. And after you got through selling some of it and bringing the rest of it here, with you, was there anything left there at Menominee that belonged to the house?

A. There was this desk that he speaks of; my brother took that into his possession.

Q. That was the only piece of furniture that you remember?

A. That is all I remember yes.

Q. And then, when you came on here, where did you first stop—you came on here with Mrs. Selleck, your mother-in-law?

A. Yes sir.

Q. Where did you first stop when you first came on here?

A. In Bethel.

Q. With some relatives there?

A. Yes.

Q. How did you come to move into this house 33 Pleasant Street? isn't it?

A. Yes sir.

Q. That is the house you have lived in ever since?

A. Yes, sir.

Q. How did you come to move in here?

A. How did I come to move in there?
54 Q. Yes.
A. Because we thought it was better to go to housekeeping if we could get moved in there. He said he would fix it up so we could get moved in there for a while while — were here.
Q. Did you put the furniture in your house that you brought with you from Menominee?
A. Yes sir.
Q. When you came here do you remember whether that house at 33 Pleasant Street was rented or not?
A. It was rented.
Q. It was rented to somebody else?
A. Yes.
Q. Mr. Selleck testified that he agreed to let the man have it until he wanted to move in that fall. Do you remember that?
A. Well, the man was in there. I knew that his time wasn't up until—so that he went and notified the man that he wanted the house.
Q. He notified the man that he wanted the house?
A. I think so; or the man's time was out, and he moved out; I don't remember as to that.
Q. Then you moved in there along in April, 1901?
A. I think so.
Q. With Mrs. Selleck, Mr. Selleck's mother?
A. Mr. Selleck's mother.
Q. And that was all of the family at that time, wasn't it?
A. That was all.
Q. And you lived there ever since until Mr. Selleck's death last fall?
A. Yes sir.
Q. And are living there still?
A. Yes, sir.
Q. Now, you testified I believe that Mr. Selleck while he was in Menominee, belonged to some social organizations or orders?
A. Yes sir.
Q. How about Danbury, did he belong to any in Danbury?
A. No sir.
Q. What?
A. How?
Q. What?
A. Belonged to any association?
Q. Yes—in Danbury?
A. No sir; *nothinly* only church; that is all; if you call——
Q. And you said that you belonged to a church out there, Mrs. Selleck?
55 *Q.* Yes sir.
Q. Well, you joined the church here when you came on?
A. What?
Q. Well, you joined the church here when you came on?
A. Yes, we did.
Q. All of you?
A. Yes.

The COURT: Is there a Presbyterian church in Danbury? Mrs. Selleck?

A. No; Congregational.

Q. Did you take a letter from your Presbyterian church out west and have them—do you have such relations between the two that you can take a letter from one to the other?

A. Yes sir.

The COURT: Did you take letters from one to the other?

A. Yes, we did, after we had been here a while.

The COURT: Got letters after you had been in Danbury for a while?

A. Yes sir.

Q. I understand you—after you had been here a little while you got a letter from your Presbyterian church and joined all three of you, joined the Congregational church on the strength of that letter?

A. Joined the Congregational church, yes, sir.

The COURT: Do you know enough about your husband's relationship with the Masonic ordder—whether he took any demit as they call it?

A. I do not.

The COURT: You don't think he did?

A. He paid dues out there last.

The COURT: Kept paying dues there?

A. Yes, we took out letters from Menominee and went there after we had been here a short time. Mr. Selleck didn't want to do it, and so told his mother, but she rather urged him; she wanted to unite with the church here. And he said "Well send and get your letter and I and my wife will leave ours; there is no use taking them out because we won't be here very long." But she wanted to have the letters, to unite with this church.

Q. You did, as a matter of fact—you got them for all three?

A. Yes sir.

56 Mr. PIERCE: But never took a "demit" from his lodge?

The COURT: She said he didn't.

A. I could have brought his receipts with me.

Mr. PIERCE: But she says he paid his dues there.

A. For I have them there now.

The COURT: That is a rather interesting question—whether the dues in the Menominee lodge are cheaper than the dues in the Danbury lodge.

Q. Do you remember about what time it was that you, your husband and your mother-in-law, joined this church in Danbury?

A. I don't remember the date, but we hadn't been here a very great while.

Q. Shortly after you came?

A. I don't know whether it was one or two or three years, I couldn't tell you; I know it was longer than one year; it was perhaps two years.

Q. Did your husband ever take any part in the church activities here as a committee man?

A. Not to my knowledge.

Q. You don't remember his signing any call for a meeting of the church?

A. I don't know whether he ever did or not.

The COURT: That is all.

(Recess until two o'clock.)

57 Afternoon Session.

Depositions of George A. Turner, A. L. Sawyer and Fred S. Norcross read by Mr. Taylor.

(Reading of caption and notary's certificate waived.)

George A. Turner (Deposition).

Q. Please state your name, age, residence.

A. My name is George A. Turner, my age is 61, residence Marinette, Wisconsin.

Q. Do you know Isaac H. Selleck and are you related to him?

A. Yes sir, he is my brother-in-law.

Q. Did he ever live in Menominee and if so when?

A. Yes, for several years, previous to 1891.

Q. Did you know of his holding any public office here?

A. Yes, I believe he was a member of the Board of Supervisors.

Q. Did you know of his belon-ing to any fraternal organization?

A. Yes.

Q. Do you know when he went away and for what purpose?

A. As near as I can tell about 1890, or 1891, to Danbury, Conn., to settle an estate of his uncle that was left to him he was first gone about five or six months and then came back and took his family down with him.

Q. Did you hear him say anything about retaining his residence here when he went away?

A. Yes, he said he liked here much better than down there, but the estate that had fallen to him was badly scattered and he could not tell how long it would take to settle it; that his mother was getting old and would like to go back to her old home and he would rather have his family with him and so he was going to take them back there while he was settling the estate, and that he intended to return to Menominee, when the estate was settled.

Q. Did you know of his leaving a desk here to indicate his holding his residence?

A. Yes, he left his desk in my charge and has never called for it yet, I still hold it for him.

58 Q. Do you know what his wife's intentions were, as to their return here?

A. His wife was my sister and said they would return here when they got matters settled down East. My wife and Mr. Selleck's wife carry on a correspondence and Mr. Selleck's wife has often in her letters expressed their intent to return to Menominee eventually.

Q. Has he been back to Menominee, since he left about 1891?
A. No sir.

59 *A. L. Sawyer (Deposition).*

Q. Please state, your name, age, residence and occupation?
A. My name is Alvah L. Sawyer, age 55, residence, Menominee, Michigan, for the past thirty years, occupation, lawyer.
Q. Do you know, Isaac H. Selleck and if so how long have you known him and where?
A. I knew him for a number of years next preceding the year 1891, at Menominee, and in this vicinity.
Q. Did he hold any official position, or belong to any fraternal society when you knew him?
A. Yes, he was a member of the County Board of Supervisors, and held the chief office in a prominent fraternal society.
Q. Did you know of his going away from Menominee, and what his intentions were as to retaining his citizenship there?
A. As near as I can remember it was about 1890 or 1891, that he left Menominee. He used to be in my office frequently, and I remember of his going East to Connecticut, as he said to settle an estate which his uncle had left to him. He returned after a few months and then took his family East with him. I remember his telling me at that time that the estate which had been left to him was badly scattered and that it might take a long time to settle it, and it was in such condition it would require his personal attention. He also said his mother was getting old and would like to go back to her old home and so he was going to take his family back there, so they could all be together there as long as he had to stay. He also said that he intended to return to Menominee, or words to that effect and I remember he said he liked here better than in the East, and that his wife did also.
Q. Did you know of his leaving a desk, or any other property in Menominee, when he went East?
A. All I knew, was what he told me. He said he was going
60 to leave his office desk in charge of his brother-in-law and his brother-in-law, Mr. Turner has since mentioned it being here.
Q. Do you know any other thing or matter material to the issue?
A. Not that I remember of.

(A. L. SAWYER recalled.)

Q. How long have you been a practicing attorney in Michigan, and in what courts do you practice?
A. I have been a practicing attorney regularly admitted, in Michigan, for over thirty years. I practice principally in the Circuit and the Supreme Courts.
Q. You stated in your former examination herein that Isaac H. Selleck was a member of the County Board of Supervisors. Please state of what County, and what -re the qualifications especially essential for a person in that office?

A. He was a member of the Board of Supervisors of Menominee County. By law of Michigan a supervisor of that Board is required to be a resident and legal voter in the township or ward represented by him as such supervisor.

Q. State whether or not you knew of his having acted upon said Board of Supervisors.

Q. Yes, I saw — at the meetings of the Board, and taking part in their proceedings at different times.

61 *Fred S. Norcross (Deposition).*

Q. Please state your name and occupation?

A. My name is Fred S. Norcross; I am City Clerk in and for the City of Menominee, Michigan, and have been such Clerk for several years.

Q. As such clerk do you have the custody of the register of the voters in the various wards of the City of Menominee, and if so have you in your possession as such clerk the registry of the voters who voted in the Fourth Ward of said City at the November election in the year 1900?

—. ——.

Q. Can you tell by an examination of that record who voted at that election?

A. I can tell the names of every person recorded as having voted at that election by examining that registry, because a certain check mark is used, universally, to indicate the registered voters who cast their votes at that election.

Q. Will you tell me whether or not the name of Isaac H. Selleck appears on the Registry of that ward for the year 1900, as a legal voter in that ward?

A. It does.

Q. State whether or not the Register indicates or shows that he voted in the November election 1900?

A. The record shows that he did vote at that election at that ward. There is the proper check in the proper column to record such a vote.

Q. Did you know Isaac H. Selleck at that time?

A. I used to know Isaac H. Selleck very well, but it is a good many years since I saw him and I do not now fix the date from memory. I know he was considered a resident of the City, and knew of his belonging to a fraternal order here.

62 Witness Mr. GEORGE M. STEBBINS sworn by the Clerk.

Examined by Mr. PIERCE:

The CLERK: What is your full name?

A. George M. Stebbins.

Q. You live where, Mr. Stebbins?

A. Danbury.

Q. And you hold what office?

A. Town Clerk.

Q. And have you in that office in your custody the official list of voters of Danbury?

A. Yes sir, I have.

Q. Have you the book with you?

A. I have the book with me.

Q. Have you made an examination of that book running back for a good many years?

A. Back to 1900.

Q. And does Isaac H. Selleck appear upon the list of voters?

A. He does not.

Mr. TAYLOR: You have some other books here, Mr. Stebbins?

A. That is all I have brought.

Mr. TAYLOR: That is the entire list for 1900?

A. That is the list of all such electors that the town of Danbury ever had so far as I know since 1820.

The COURT: Have you the list of voters—asking to be made voters?

A. No; not here.

(Cross-examination waived.)

63 Mrs. JENNIE E. SELLECK sworn by the Clerk.

Examined by Mr. PIERCE:

The CLERK: What is your full name?

A. Jennie E. Selleck.

Q. You are the widow of Benjamin Selleck?

A. Yes sir.

Q. —who is mentioned in this case. Did you or did you not have a conversation with Isaac Selleck sometime in the year 1901 about the time when his wife and mother came to Connecticut?

A. Well, I couldn't tell just what time it was; but it was before his wife and mother came here.

Q. What, if anything did he say as to his intention in removing them here, or his intention to return from Menominee?

A. Why, he intended that he——

The COURT: What did he say—that is what the Senator asked you—not what he intended, but what did he say, as best you remember it?

A. Shall I repeat the conversation?

The COURT: As best you remember it?

A. I asked Isaac when his wife and mother were coming on; and he said, "Oh, I don't know; when they get packed up". Benjamin Selleck said to Isaac, "Why, Ike, what are you going to do with your house" and he made answer either "it is rented" or "we are going to rent it." I don't know just which way he said it, but to that amount. Benjamin Selleck said, "Why, you will sell it, won't you? or something to that amount. Isaac said "No, we don't want to sell it".

Q. Go on.

A. Does that answer your question?

Q. If that is all. Did he say anything further?

A. Why he gave reasons why he didn't want to sell it. Do you wish me to state the reasons?

Q. Sure.

A. He said—in the first place, he said—"why, we built the house, and we like it very much, we like everything out there; and my wife's people live there." And from that he turned on to speaking of his relations with his—in his lodge, telling us how very pleasant they were, what offices he had held from time to time and I think that is all that I — in that line.

64 Q. What, if anything, did he say about returning there?

A. Why, I said to Isaac after he said—after Benjamin asked him about selling the place—,I said "Why you certainly wouldn't ever think of returning there to live would you? "Why certainly," he said "we expect to go back.

Cross-examination by Mr. BEACH:

Q. I understand, Mrs. Selleck, that at that time, Mr. Isaac H. Selleck either said or intimated that he didn't want to sell his house in Menominee—that is it isn't it?

A. He said "we don't want to sell it."

Q. At that time?

A. He said that in the first; in the first——

Q. Did you afterwards knew that he had sold it?

A. Why, I don't think that he had sold it at that time.

Q. No, not then. But did you afterwards know that he did sell it?

A. A long time after I knew that.

Q. That is all.

Mr. PIERCE: That closes our testimony upon that point.

The COURT: You expect to rest your case upon the testimony that has been submitted, as I understand you?

Mr. BEACH: Oh no, sir. We offer in evidence now the tax list of the town of Danbury, of Isaac H. Selleck, residing 33 Pleasant Street, for the year 1903, for the purpose of showing that in that year he paid taxes on certain personal property enumerated in that List; also the town tax list of Isaac H. Selleck, residing on 33 Pleasant Street for the year 1903, for the purpose of showing that he paid taxes, personal property, taxes on personal property in that town in that year; also taxable list of Isaac H. Selleck in the town of Danbury, residing on 33 Pleasant Street, in the year 1904, for the same purpose; also the city tax list of Isaac H. Selleck, residing on 33 Pleasant Street, for the year 1903, for the purpose of showing that he paid taxes on personal property to the city of Danbury, in that year, and also paid a poll tax.

Mr. TAYLOR: What year?

Mr. BEACH: 1903.

65 Mr. TAYLOR: That is going backwards.

The COURT: He would not pay the poll tax to the city.

Mr. BEACH: Yes, sir, pays the poll tax to the city.

The COURT: I thought that was a town tax.

Mr. BEACH: It seems to be here on the city tax list; and the copies are certified, so I suppose it is correct.

Mr. PIERCE: City tax lists, Isaac H. Selleck, residing on 33 Pleasant Street, Danbury, in the city of Danbury, for the year 1904, to show that he paid taxes on personal property, to the city of Danbury, for that year, and also paid a poll tax.

I will ask that these certified copies be marked as exhibits in the order in which I have mentioned them as Defendant's exhibits 1, 2, 3, 4, and 5.

Mr. TAYLOR: We object to that to get it on the record unless the gentleman means—so far as the payment of the poll tax is concerned, either in the town or city—unless he follows it up and makes the connection to show that he was actually an elector. However, I think perhaps that may go to the weight of the evidence, itself, but it is within the province of this court to say. You cannot introduce something — a tax list that perhaps somebody else has made up and charge him with a poll tax or even designate him as a resident; there is a manifest distinction between residency and citizenship; and I make a formal objection unless they prove it in relation to poll tax, as connected with the actual fact that he was an elector. It means simply that he was paying taxes; how it happened and in what way it does not appear. It may be the weight of testimony more than anything else, and it is within the province of the Court to say that it is so slight of weight that it ought not to be permitted to go in.

The COURT: The first mistake you make, in my judgment is the idea in your mind that something is going to the Jury. That is the first error you jump at. I don't think this is a Jury
66 matter at all. It is a fundamental question as to the jurisdiction of this Court. The fact that a Jury has been impanelled to try some issues between the plaintiff and defendant is incidental to the main question of whether the Court has jurisdiction to put any controversy before this particular Jury; and if, after I have heard the testimony, I am of the opinion that the Court has no jurisdiction of the controversy, I think it is my duty, representing the Court to say so. I don't think that is a question for the Jury to pass upon. They are here for another purpose that is, to decide a contention between these parties when we get to the point where it is a contention between these parties.

Mr. TAYLOR: We have made no objection about the Court differentiating. In the first instance it comes before your Honor how readily a legal mind would separate these things, but I do claim——

The COURT: I simply want to get everything that either party would tell me bearing upon the first allegation as to whether the plaintiff was a citizen of Michigan.

Mr. TAYLOR: We have assumed that was our fundamental fact. In taking this objection we have got to preserve our rights. I want to get it fairly on the record in case it passes your Honor.

The COURT: Note an exception then.

(Exception noted.)

(Tax lists referred to laid in evidence and marked Defendant's Exhibits 1, 2, 3, 4, and 5, respectively.)

67 Mr. CREED F. FUDGE sworn by the Clerk.

Examined by Mr. BEACH:

The CLERK: What is your full name?
A. Creed F. Fudge.
Q. Where do you live, Mr. Fudge?
A. Danbury.
Q. Are you the clerk of the Second Congregational church in Danbury?
A. I was previously to its uniting with the first church.
Q. When did it unite with the first church?
A. It has been about three or four years.
Q. Three or four years?
A. Yes, sir.
Q. And as such clerk of the second congregational church have you in your possession the records of that church?
A. I have the records of the old second Congregational church.
Q. The records of the old second Congregational church?
A. Up to the time it united.
Q. Will you please turn to page 24 that is on the record book, and if you find anything there relative to Isaac H. Selleck will you please read it?

Mr. TAYLOR: Is it to fix the date?
Mr. BEACH: It is to fix the date when he and his wife and mother joined the church.
Mr. PIERCE: You really ought to let us see that. There is no objection to that at all.

A. January seventh. This article refers to members added to the church during the year '03 by letter and on confession of faith. Then there is other names ahead of that.
The COURT: January seventh of what year is that entry?
A. June seventh, nineteen hundred and three.
The COURT: June seventh, nineteen hundred and three.
Q. Does it appear upon your record that Isaac H. Selleck, Mrs. Martha Selleck, Mrs. I. H. Selleck (Charlotte Selleck) June
68 seventh, nineteen hundred and three, they were admittd to your church, the second Congregational, by letter from the Presbyterian.
A. It doesn't show by the record from where they came.
Q. It simply shows that they were admitted on June seventh, nineteen hundred and three?
A. By letter.
Q. Does it show that it is all three?
A. Yes, sir.
Q. It doesn't show from where the letter came?
A. No.
The COURT: But by letter they were admitted?

Q. Please turn to page 253—give the date of that entry?
A. March 25th 1904.
Q. What comes under that date?
A. A call for special meeting dated,

"DANBURY, *March 25th*, 1911.

NOTICE.—A special meeting will be held in the second Congregational Church Wednesday Evening, March 30th, 1904, at 7:30 p. m. to consider the question of the pastor's salary for another year; salary not to exceed $1,200.00; also to vote to rescind the vote *vote* taken one year ago on certain articles and resolutions; also to reinstate all members who wish to come back; and to transact any other business necessary to come before said meeting; the voting to be done by ballot.

(Signed) ARTHUR M. PAYTON.
T. H. HARRISON.
F. N. SHOVE.
D. F. STEVENS.
I. H. SELLECK.

HARRY S. PARCELS, *Clerk.*"

The COURT: That doesn't show in what capacity they signed that?

A. No, that doesn't show, only as members of the church.

The COURT: Just as members of the church. I suppose
69 you have to get on it your church ritual and rules too. I suppose a certain number of members of the parish can call a special meeting—that is the idea?

A. Yes sir.

The COURT: Would it require in order to get a special meeting, require a call sent by a certain number of members?

A. Four members of the parish.

The COURT: And the members of the church are ex-officio members of the parish?

A. Members of the church are supposed to be members of the parish; it is all the same. You have to be members of the church to call a special meeting of the church.

The COURT: You don't have that distinction that we have in the Episcopal church between parish and members?

A. Our society and the church are all one.

The COURT: The fact of membership in the church gives you a right.

Q. Take from page 15 and read the fourth article that appears there?

A. "Article 4, A written notice signed by not less than four members of the church shall be empowered to call a meeting of the church."

Q. That is all we need of that, I think. Read the eighth article?

A. "Application for Church Membership, either by letter or profession of faith, must be made to the examining committee, at least"——

The COURT: I understand. That is all, Mr. Fudge.
Mr. PIERCE: Mrs. Shelleck spoke of that this morning.
The COURT: She didn't fix the date.

(Cross examination waived.)

70 Mr. HENRY STARR sworn by the Clerk.

Examined by Mr. BEACH:

The CLERK: What is your full name?
A. Henry Starr.
The CLERK: You are of Danbury?
A. Yes, sir.
Q. Where do you live Mr. Starr?
A. Danbury.
Q. How long have you lived there?
A. Always; all my life.
Q. And whether or not you are one of the appraisers on the estate of the late Jarvis Selleck?
A. I was.
Q. Was Mr. Isaac H. Selleck one of the heirs of that estate?
A. Yes sir.
Q. When did Mr. Selleck, Jarvis Selleck die?
A. Died along in the fall—in February.

The COURT: It is agreed that it was 1900. You cannot call February fall.

Q. Did you have any conversation with Isaac H. Selleck while you were acting as appraiser on that estate relative to his intention as to where he was intending to make his home?
A. Yes, sir.
Q. Well, now, won't you tell the Court and the Jury, what it was that he said to you on that subject?
A. Well, we were appraising the stock, cattle, things like that around there; and we were around there together and we got to talking about one thing and another; finally he got to talking about coming to Danbury to live; he says, "I am coming to Danbury to make my home, I have got to go back once more, and then I am going to make it my home; my property now is here." That is, after he had this property fall to him. And he said he always liked Danbury.

Cross-examination by Mr. PIERCE:

Q. He said he had always liked Danbury?
A. Yes, sir.
Q. Never had lived there before?
A. He was born there, I understand.
Q. Left there before he was four years old?
A. Always stated that he liked Danbury.
Q. Are you sure about that?
A. Yes sir.
71 Q. Just as sure of that as you are of the rest of it?
A. I am pretty sure of that.

Q. That he always liked Danbury?
A. Said he liked Danbury.
Q. You say he said he always liked Danbury?
A. Said he liked Danbury.
Q. That is all.

The COURT: You have always lived in Danbury?
A. Yes sir.
The COURT: It is your home?
A. Yes, sir.
The COURT: Got property there, I suppose?
A. Yes sir.
The COURT: And you hadn't known Mr. Selleck personally until his uncle died?
A. Not Isaac Selleck.
The COURT: At the time his uncle died and you were appointed appraiser on the estate you saw him because he came on from the west?
A. First time I ever saw him.
The COURT: Was it the first time you saw him that he had this talk?
A. Yes, sir.
The COURT: Where were you when you had this talk?
A. Appraising stock.
The COURT: You were there and he was there?
A. On the Ridgefield——
The COURT: How did it come up, did you talk with him or he with you?
A. We both talked together about one thing and another when he was around there looking over things: got talking about one thing and another and this thing came up—liked Danbury property was here, and he was going to make it his home.
The COURT: You are pretty sure that you got that straight?
A. I got that right, yes sir.

The COURT: That is all.

72 Dr. NATHANIEL SELLECK sworn by the Clerk.

Examined by Mr. BOOTH:

The CLERK: What is your full name?
A. Nathaniel Selleck.
Q. Where do you live?
A. Danbury.
Q. Lived there a good many years?
A. All my life.
Q. Did you know the late Isaac H. Selleck?
A. I did.
Q. Any relative of yours?
A. A distant cousin.
Q. Do you remember any occasion upon which you had a talk with him——

The COURT: Did you address him as Doctor? Are you a doctor?
A. A doctor of medicine? *A* An M. D.
The COURT: Practicing medicine in Danbury?
A. Yes sir.

Q. Do you remember having had a conversation with Mr. Isaac H. Selleck in which the question of whether he was a would be voter in the town of Danbury came up?

A. I requested him one time to go down and be made a voter, the board being then in session; and he assured me that he would the next morning.

Q. Do you remember about when that was?
A. About 8 or 9 years ago.
Q. Would you fix it any better than that, Doctor?
A. No, I couldn't.

Cross-examination by Mr. PIERCE:

Q. He never was made a voter?
A. That I don't know as far as my own knowledge.
Q. The Clerk says she wasn't. Do you know anything to the contrary?
A. I know nothing to the contrary, no sir.
Q. That is all.

73 JESSIE E. SELLECK sworn by the Clerk.

Examined by Mr. BEACH:

The CLERK: What is your full name?
A. Jessie E. Selleck.
Q. Where do you live?
A. Ridgefield.
Q. Did you know the late Isaac Selleck?
A. I did.
Q. Was he any kin of yours?
A. Of my husband.
Q. What was his relationship to your husband?
A. Second or third cousin, I don't know which.
Q. He was a cousin?
A. A cousin.

Q. Did he or did he not come to stay at your house with your husband and yourself when he came on here shortly after the death of Jarvis Selleck?

A. He did; from the first of April, until June.
Q. In what year?
A. 1900, I think the year that Jarvis died, perhaps 1900.

Q. Now, do you remember having any conversation with Mr. Isaac Selleck during that interval between February and June, 1900, in which he said anything as to what his intention was as to his future residence or home?

A. I asked him if he would make it his home here; and he said he would, "Why, not, my interest is here." And one time my mother was at the house and *ask* asked him the same question, and he made the same reply.

Q. Do you remember whether or not there was any project at any time while he was in your house of having a monument family monument, erected out of the funds of the Jarvis Selleck estate?

Mr. TAYLOR: If Your Honor please, that single isolated question I have no objection to, but——

A. There was.

Q. And whether or not you had any conversation with Mr. Isaac H. Selleck relative to that monument?

Mr. TAYLOR: If it is answered in the affirmative "Yes" that is all right.

74 Mr. BEACH: I would rather have her tell the story of that conversation without going into any other particulars.

Mr. TAYLOR: I am going to object to the substance of the question for this reason—that Isaac H. Selleck's deposition was taken last April, and all this transaction took place a long time before, and this woman's husband is one of the defendant's executors, of Benjamin Selleck's estate; and it is impossible to inquire of the plaintiff in relation to any of these adverse statements; he is dead and gone now.

The COURT: I will exclude it.

Mr. TAYLOR: Your Honor will exclude it?

The COURT: Yes.

That is all, Mrs. Selleck.

(Cross examination waived.)

75 EMMA S. DAVID sworn by the Clerk.

Examined by Mr. BEACH:

The CLERK: What is your full name?

A. Emma S. David.

Q. Where do you live?

A. Danbury.

Q. And you are the daughter of Darius Selleck?

A. Yes, sir.

Q. And the administratrix with the will annexed of his estate?

A. I am.

Q. And your father was a cousin, or uncle, wasn't he, of Isaac?

A. Uncle of Isaac Selleck.

Q. And you were acquainted with Mr. Isaac H. Selleck, were you?

A. I was.

Q. Do you remember the time when he came on here, shortly after Jarvis Selleck's death?

A. I do.

Q. Did you or not have any conversation with him in regard to where he intended to make his future home?

A. I did.

Mr. TAYLOR: I object——

The COURT: Won't you object to the Court, please?

Mr. TAYLOR: I object, if the Court please.

The COURT: The same objection?

Mr. TAYLOR: Especially as she, as I take it, was in close connection with one of the parties, to the action. Went right up there and examined Mr. Selleck, and never asked on cross-examination anything about these so-called adverse statements—the man is dead now.

Mr. BEACH: I don't know of any rule that would require us to take Mr. Selleck's testimony in this matter in place of Mrs. David's.

Mr. TAYLOR: You cannot hold back this matter on cross-examination and then, after the witness is deceased and his lips are closed——

The COURT: I think you are quite right in your legal position Mr. Beach: but in view of the probable solution of this question, which will arrive in a few minutes, I think I will sustain the objection.

That is all, Mrs. Selleck.

Mr. BEACH: If Your Honor cares to hear any argument on
76 this question I have prepared a memorandum.

The COURT: I don't care for anything Mr. Beach.

If I am correct in my position—I assume that a question of this character, touching the jurisdiction of the Court is purely a question for the Court to pass upon before we arrive at the stage of the case, where any questions of fact between the parties would be submitted to the jury; and I further assume that it is the duty of the Court, even if its attention had not been called to the question of jurisdiction by the defendants, if at any moment the Court is satisfied as to the testimony produced that it has no jurisdiction—it is its duty, of its own accord, to call the attention of all the parties and counsel and everybody interested to the situation and decline to proceed with the case. That is my understanding of the position; and if I am right it strikes me that this testimony as presented to me—it is beyond question that this Court has no jurisdiction.

Mr. PIERCE: Will your Horor hear me?

The COURT: I don't care to hear you, because I don't conceive it to be a matter for argument; it is so absolutely plain.

Mr. PIERCE: Allow us to get upon the record in some way our claim that this is a litigated matter, testimony on both sides, issue of pleadings on both sides; and we are entitled to go to the jury.

The COURT: You are entitled to make your objection on the record there is no doubt about that; but I am clearly of the opinion that it is not a question for the jury to pass upon. And I cannot, it seems to me really elementary that it could not be a question for the jury to pass upon, because the case didn't reach a point where the jury has an interest in it. The jury is here to pass upon a certain contention between a plaintiff and a defendant upon pleadings. Now, at the very outset, testimony satisfactory to the Court that the diversity of citizenship does not exist—I think it is the duty
77 of the Court to dismiss the case for lack of jurisdiction; and that I do. And you are entitled to your exceptions.

Mr. TAYLOR: Then, we want to incorporate in the record that the citizenship, once it has been established in Michigan, it is *a* assumed to obtain until the contrary is established, and that, among the facts

as adduced to the Court, there is no evidence of a change of citizenship.

The COURT: That, it seems to me, is all a matter of argument.

Mr. TAYLOR: But we do want *to* proceedings of error to show it.

The COURT: You have just one recourse from the opinion, Gentlemen, and that is the Supreme Court of the United States; you can take this matter to them and find out whether it is right or wrong.

Mr. PIERCE: We claim that it is a question of facts, and should be submitted to the jury, under the instructions of the Court.

The COURT: You have the benefit of that: and the testimony which has been taken here today, will be sent up to the Supreme Court as a part of the record; and you will have the situation all presented there as to whether I have exercised proper discretion, or whatever you please to call it, in my treatment of this matter. If the Supreme Court think I am wrong, why, they will send it back here, and I shall be very glad to hear you again. But I am so thoroughly convinced in my own mind, that it is not a case within my jurisdiction that until we are told by higher authority that I ought to do it, I don't think it is my duty to continue it; that I would be violating my oath of office if I should go on now with the case in this position.

Mr. TAYLOR: Would you also have it appear that we make the claim of law, that the question of diverse citizenship is dependent on two facts; one, the domicile and residence in Michigan; and the intention to change the same to Connecticut, and the actual change of the same? And that both of those facts not having appeared that it would be error to dismiss the case because the Michigan
78 residence still continues until both of these elements of a new citizenship are established.

The COURT: If it were even a fairly doubtful question, and I have consulted in my mind if it were, I would perhaps, give the benefit of the doubt and go ahead; but I am absolutely so convinced that I don't feel that it would be justice to anybody to do it.

Mr. TAYLOR: Here is another point; I would like to raise. Six years have elapsed since the cause of action first accrued and unless there is a saving statute in the Connecticut statutes, which would allow a new action to be brought, the plaintiff has lost his cause of action; and that it appears from all of the evidence in the case that the defendants could have raised the question of jurisdiction by their motion earlier than April 1911.

The COURT: I don't really think they could raise it until there was some testimony in the case, I don't understand that they ever filed any motion to dismiss until after you took your testimony by deposition, did you, Mr. Beach?

Mr. BEACH: No, sir; it was only after the deposition was taken, and in consequence of what we learned there.

The COURT: That was the first time that anything appeared except the pleadings upon which the defendants could base any action at all. But there is no objection to your raising all kinds of questions.

Mr. TAYLOR: We would like to state that the withholding of the

motion to dismiss until after the taking of Mr. Selleck's deposition, in April, 1911, is no excuse for the laches of the defendant because all of the facts developed in such deposition in relation to his residence in Danbury and his holdings there, and the tax lists, etc., were open and notorious; facts accessible to the defendants
79 and could have been easily obtained; and nothing new was developed in the deposition but what was presumably within their knowledge.

I hereby certify that the foregoing is a full and true transcript of the oral testimony given on the trial of the above entitled cause, and of that portion of the deposition of Isaac H. Selleck, as herein set forth, and of the depositions of George A. Turner, A. L. Sawyer, and Fred S. Norcross.

Attest:

ROBERT A. WINSLOW, JR.,
Stenographer.

The foregoing constitutes all of the testimony and a statement of all of the evidence introduced or offered upon the trial of this cause, upon the issue of the truth of the allegations of the first paragraph of the substituted complaint, alleging diverse citizenship.

After the conclusion of the evidence, and prior to the decision by the Court, on said question of diverse citizenship, the plaintiff raised the following questions of law, which the court overruled and the plaintiff duly excepted.

Mr. BEACH: If your Honor cares to hear any argument on this question I have prepared a memorandum.

The COURT: I don't care for anything Mr. Beach. If I am correct in my position—I assume that a question of this character, touching the jurisdiction of the Court, is purely a question for the court to pass upon before we arrive at the stage of the case where any questions of fact between the parties would be submitted to the jury and I further assume that it is the duty of the Court, even if its attention had not been called to the question of jurisdiction by the defendants, if at any moment the Court is satisfied as to the testimony produced that it has no jurisdiction—it is its duty of its own accord, to call the attention of all the parties and counsel and everybody interested to the situation and decline to proceed
80 with the case. That is my understanding of the position; and if I am right it strikes me that this testimony as presented to me, it is beyond question that this court has no jurisdiction.

Mr. PIERCE: Will your Honor hear me?

The COURT: I don't care to hear you, because I don't conceive it to be a matter for argument; it is so absolutely plain.

Mr. PIERCE: Allow us to get upon the record in some way our claim that this is a litigated matter, testimony on both sides, issue of pleadings on both sides, and we are entitled to go to the jury.

The COURT: You are entitled to make your objection on the record; there is no doubt about that; but I am clearly of the opinion that it is not a question for the jury to pass upon. And I cannot—it

seems to me really elementary that it could not be a question for the jury to pass upon, because the case didn't reach a point where the jury has an interest in it. The jury is here to pass upon a certain contention between a plaintiff and a defendant satisfactory to the Court that the diversity of citizenship does not exist—I think it is the duty of the Court to dismiss the case for lack of jurisdiction; and that I do.

And you are entitled to your exceptions.

To which finding and ruling of the court, the plaintiff duly excepted.

2.

After the conclusion of the evidence, and before the decision dismissing said action for want of jurisdiction, the plaintiff raised the following questions of law, which the court overruled and the plaintiff duly excepted.

Mr. TAYLOR: Then, we want to incorporate in the record that the citizenship, once it has been established, in Michigan, it is
81 assumed to obtain until the contrary is established; and that, among the facts as adduced to the Court, there is no evidence of a change of citizenship.

The COURT: That, it seems to me, is all a matter of argument.

Mr. TAYLOR: But we do want the proceeds in error to show it.

The COURT: You have just one recourse from the opinion, Gentlemen, and that is the Supreme Court of the United States, you can take this matter to them and find out whether it is right or wrong.

To which finding & ruling of the court, the plaintiff duly excepted.

3. After the conclusion of said evidence, and before the rendition of said judgment, dismissing said action for want of jurisdiction the plaintiff raised the following questions of law, which the court overruled, and plaintiff duly excepted.

Mr. PIERCE: We claim that it is a question of facts, and should be submitted to the jury under the instructions of the court.

The COURT: You have the benefit of that; and the testimony which has been taken here today will be sent up to the Supreme Court as a part of the record; and you will have the situation all presented there as to whether I have exercised proper discretion or whatever you please to call it, in my treatment of this matter. If the Supreme Court think I am wrong, why, they will send it back here, and I shall be very glad to hear you again. But I am so thoroughly convinced in my own mind, that it is not a case within my jurisdiction, that until we are told by higher authority that I ought to do it, I don't think it is my duty to continue it, that I would be violating my oath of office if I should go on now with the case in this position.

To which finding and ruling of the court, the plaintiff duly excepted.

82 After the conclusion of the evidence, and before the rendition of said Judgment, dismissing said case for want of jurisdiction, the plaintiff raised the following questions of law, which the court overruled and plaintiff duly excepted.

Mr. TAYLOR: Would you also have it appear that we make the claim of law that the question of diverse citizenship is dependent on two facts, one, the domicile and residence in Michigan; and the intention to change the same to Connecticut, and the actual change of the same. And that both of those facts not having appeared that it would be error to dismiss the case because the Michigan residence still continues until both of these elements of a new citizenship are established.

The COURT: If it were even a fairly doubtful question, and I have consulted in my mind if it were, I would perhaps give the benefit of the doubt and go ahead; but I am absolutely so convinced that I don't feel that it would be justice to anybody to do it.

To which finding and ruling of the court, the plaintiff duly excepted.

5.

After the conclusion of the evidence and before final judgment, dismissing said action, for want of jurisdiction, the plaintiff raised the following questions of law, which the court overruled and plaintiff duly excepted.

Mr. TAYLOR: Here is another point I would like to raise. Six years have elapsed since the cause of action first accrued, and unless there is a saving statute in the Connecticut statutes, which would allow a new action to be brought, the plaintiff has lost his cause of action, and that it appears from all of the evidence in the case, that the defendants could have raised the question of jurisdiction by their motion earlier than April 1911.

The COURT: I don't really think they could raise it until there was some testimony in the case. I don't understand that they ever filed any motion to dismiss until after you took your testi-
83 mony by deposition, did you, Mr. Beach?

Mr. BEACH: No, sir, it was only after the deposition was taken and in consequence of what we learned there.

The COURT: That was the first time that anything appeared except the pleadings upon which the defendants could base any action at all. But there is no objection to your raising all kinds of questions.

Mr. TAYLOR: We would like to state that the withholding of the motion to dismiss until after the taking of Mr. Selleck's deposition in April, 1911, is no excuse for the laches of the defendant because all of the facts developed in such deposition in relation to his residence in Danbury, and his holdings there, and the tax lists, etc., were open and notorious; facts accessible to the defendants and could have been easily obtained; and nothing new was developed in the deposition but what was presumably within their knowledge.

To which ruling and finding of the court, the plaintiff duly excepted.

6.

Upon the trial of said cause, the court, admitted against the plaintiff's objections, defendants' Exhibits 1-5 inc. being certain tax lists purporting to be signed by the plaintiff dec-dent, and the following rulings and findings were made, to which the plaintiff duly excepted.

Mr. BEACH: We offer in evidence now the tax list of the town of Danbury, of Isaac H. Selleck, residing at 33 Pleasant Street, for the year 1902, for the purpose of showing that in that year, he paid taxes on certain personal property enumerated in that list; also the town tax list of Isaac H. Selleck residing on 33 Pleasant Street, for the year 1903, for the purpose of showing that he paid taxes—personal property taxes—on personal property in that town in that year, also taxable list of Isaac H. Selleck in the town of Danbury,
84 residing on 33 Pleasant Street, in the Year 1904, for the same purpose, also the city tax list of Isaac H. Selleck, residing on 33 Pleasant Street, for the year 1903, for the purpose of showing that he paid taxes on personal property to the city of Danbury, in that year, and also paid a poll tax.

Mr. TAYLOR: What year?

Mr. BEACH: 1903.

Mr. TAYLOR: That is going backwards.

The COURT: He would not pay the poll tax to the city.

Mr. BEACH: Yes, sir, pays the poll tax in the city.

The COURT: I thought that was a town tax.

Mr. BEACH: It seems to be here on the city tax list and the copies are certified, so I suppose it is correct.

Mr. PIERCE: Eve- an alien has to pay a poll tax now. The poll tax, so far as I know now—they were in the town taxes.

Mr. BEACH: City tax list, Isaac H. Selleck, residing on 33 Pleasant Street, Danbury, in the city of Danbury, for the year 1904, to show that he paid taxes on personal property, to the city of Danbury, for that year, and also paid a poll tax.

I will ask that these certified copies be marked as exhibits in the order in which I have mentioned them as Defendants' exhibits 1, 2, 3, 4 and 5.

Mr. TAYLOR: We object to that to get it on the record unless the gentleman means—so far as the payment of the poll tax is concerned, either in the town or city—unless he follows it up and makes the connection to show that he was actually an elector. How-
85 ever, I think perhaps that may go to the weight of the evidence itself, but it is within the province of this Court to say. You cannot introduce something, a tax list that perhaps somebody else has made up and charge him with a poll tax or even designate him as a resident; there is a manifest distinction between residency and citizenship and I made a formal objection unless they prove it in relation to poll tax, as connected with the actual fact that he was an elector. It means simply that he was paying taxes, how it happened and in what way it does not appear. It may be the weight of testimony more than anything else, and it is within the province

of the Court to say that it is so slight of weight that it ought not to be permitted to go in.

The COURT: The first mistake, you make, in my judgment is the idea in your mind that something is going to the Jury. That is the first error you jump at. I don't think this is a Jury matter at all. It is a fundamental question as to the jurisdiction of this Court. The fact that a Jury has been impanelled to try some issues between the plaintiff and defendant is incidental to the main question of whether the court has jurisdiction to put any controversy before this particular Jury, and if, after I have heard the testimony, I am of the opinion, that the Court has no jurisdiction of the controversy, I think it is my duty, representing the Court, to say so. I don't think this is a question for the Jury to pass upon. They are here for another purpose; that is, to decide a contention between these parties, when we get to the point where it is a contention between these parties.

Mr. TAYLOR: We have made no objection about the Court 56 differentiating. In the first instance it comes before your Honor, how readly a legal mind would separate these things, but I do claim——

The COURT: I simply want to get everything that either party would tell me bearing upon the first allegation as to whether the plaintiff was a sitizen of Michigan.

Mr. TAYLOR: We have assumed that was our fundamental fact. In taking this objection we have got to preserve our rights. I want to get it fairly on the record in case it passes Your Honor.

The COURT: Note an exception then.

(Exception noted.)

(Tax lists referred to laid in evidence and marked Defendants' Exhibits 1, 2, 3, 4 and 5 respectively.)

To which finding and ruling of the court, the plaintiff duly excepted.

After the conclusion of the evidence and the presentation by plaintiff of his claims of law, and rulings of the court thereon, as herein set out, the court discharged the jury, and dismissed the action, because the court found from the above evidence that the plaintiff was a citizen of Connecticut, at the time he brought the action, and the defendants at said time, also were citizens of Connecticut, and the Court had no jurisdiction.

And now in furtherance of justice and that right may be done, the plaintiff presents the foregoing as his Bill of Exceptions in this case, and prays that the same may be settled and allowed and signed and certified by the Judge, as provided by law, and the Court does hereby sign and seal the same.

87 PLAINTIFF IN ERROR'S EXHIBIT A.

Circuit Court of the United States, District of Connecticut.

At Law. No. 564.

ISAAC H. SELLECK
vs.
EMMA S. DAVID, Executrix, and BENJAMIN SELLECK.

Notice of Motion to Dismiss the Suit for Want of Jurisdiction.

To H. W. Taylor, Esq., attorney for Isaac H. Selleck, the above-named plaintiff:

Please take notice that on Tuesday, October 10th, at the opening of the October Term of the Circuit Court of the United States, for the District of Connecticut, in the United States Court Room, at Hartford, or as soon thereafter as counsel can be heard, the defendants will move the court to dismiss the above entitled action, with costs, on the ground that the same does not involve a controversy between citizens of different states, but that the plaintiff Isaac H. Selleck is, and at the beginning of said action was, a citizen of the State of Connecticut, residing in Danbury in said State, and is not, and at the beginning of said action was not, a citizen of Michigan, as alleged in said complaint.

A copy of said motion is hereto annexed.

DEFENDANTS,
By A. T. BATES,
JOHN K. BEACH,
Their Attorneys.

88 Circuit Court of the United States, District of Connecticut.

At Law. No. 564.

ISAAC H. SELLECK
vs.
EMMA S. DAVID, Executrix, and BENJAMIN SELLECK.

Defendants' Motion to Dismiss the Suit for Want of Jurisdiction.

The defendants move the court that the above entitled action be dismissed with costs, on the ground that the same does not involve a controversy between citizens of different states, but that the plaintiff Isaac H. Selleck is, and at the beginning of said action was, a citizen of the State of Connecticut, residing in Danbury in said State; and is not, and at the beginning of said action was not a citizen of Michigan, as alleged in said complaint. And the defendants further move the court to inquire into the truth of the allegations of fact in said

motion contained and on finding the same to be true, to dismiss the above entitled cause, with costs.

DEFENDANTS,
By A. T. BATES,
JOHN K. BEACH,
Their Attorneys.

89 PLAINTIFF IN ERROR'S EXHIBIT B.

U. S. Circuit Court, District of Connecticut.

564. Law.

ISAAC H. SELLECK
vs.
BENJAMIN SELLECK et al.

Motion to Strike from Files an Undated Paper Returnable October 10, 1911, Purporting to be a Motion to Dismiss for Want of Jurisdiction, or if said Paper Has Not Been Filed, an Order, Declining to Receive or Consider the Same.

The plaintiff moves to strike from the files, the above described document if the same has not been filed, that the Court decline to receive or consider the same, for the following reasons:

1. That said so-called Motion is an irregular and improper method of raising the question of jurisdiction, dependent upon diverse citizenship because said issue of jurisdiction as involved in the diverse citizenship, is an issue of fact under the pleadings in this case, as appears by the plaintiff's complaint and answer thereto.

2. That the defendants have failed to raise said question of jurisdiction, as involving the diverse citizenship, by a plea to the jurisdiction, upon the Return Day of the process, or by other preliminary plea or motion, and have joined issue upon that issue of fact, together with other issues of fact under the plaintiff's complaint, by Answer thereto, which issue (including that of diverse citizenship) stands for trial to a jury, and the defendants are now precluded from departing from said method or trial of diverse citizenship, and raising or attempting to raise the same by the paper filed in October 1911, denominated a Motion to dismiss for want of jurisdiction.

3. That at the April 1911 Term of this Hon. Court, the Court refused to receive, consider or entertain a similar Motion to dismiss for want of jurisdiction, on account of diverse citizenship, then offered and tendered by the defendants.

90 4. That both of said documents or Motions called Motions to Dismiss tendered at the April 1911 Term of this Court, and the present one, tendered in October 1911, seven years after the action was brought and six years after the alleged cause of action has accrued, are tendered and offered too late, for the Court to exercise its discretion (if it is a matter of discretion) and

take the case from the jury, and give the defendants a separate trial thereon, when the parties have joined an issue upon the same facts under the plaintiff's complaint, more than five years ago.

PLAINTIFFS,
By DE FOREST & KLIEN,
H. W. TAYLOR,
His Attorneys.

STATE OF CONNECTICUT,
Fairfield County, ss:

DANBURY, *October 5th*, 1911.

I hereby certify that I mailed to John K. Beach, Esq., % Bristol, Stoddard, Beach & Fischer, New Haven, Conn., this 5th day of October 1911, a true copy of the foregoing.

——— ———.

Subscribed and sworn to before me, as true, October 5, 1911.

——— ———,
Justice of the Peace.

(Here follow town tax lists, marked pages 91 to 95.)

96 U. S. District Court, District of Connecticut.

Law. # 564.

ISAAC H. SELLECK
vs.
BENJAMIN SELLECK et al.

I, James P. Platt, Judge of the District Court of the United States, in and for the District of Connecticut, before whom, and a jury, the above entitled cause was tried, do hereby settle the foregoing as and for the Bill of Exceptions therein, and do hereby certify that the foregoing Bill of Exceptions contains all of the evidence offered by either party thereto on the trial of said cause, and of all other proceedings had or taken thereon, material, or any way relevant to the rulings of the court made upon said trial, or to the objections and exceptions made and taken by the respective parties upon said trial, which said rulings, objections and exceptions are in this said Bill of Exceptions, shown and made manifest, and do hereby make the same matter of record in said cause.

In Witness Whereof, I have hereunto set my hand and seal of this Court, this 19th day of October, 1912.

JAMES P. PLATT,
U. S. District Judge.

The above order is approved as to form, and no objection is made to the settlement of the annexed bill of exceptions.

JOHN K. BEACH,
Att'y for Def'ts.

[Endorsed:] U. S. Dist. Court, Dist. Connecticut. Isaac H. Selleck vs. Benjamin Selleck et al. Certificate.

97 And on the same day, the plaintiff gave notice of his intention to apply for a writ of error to review the judgment of the Court, and the Court then and there furnished to him the following certificate that the question passed upon in the judgment was solely a question of jurisdiction, which certificate is in the words and figures, following, to-wit:

U. S. District Court, District of Connecticut.

Law. # 564.

ISAAC H. SELLECK
vs.
BENJAMIN SELLECK et al.

In this cause, I hereby certify that the judgment of dismissal herein made is based solely on the ground that the record does not

show that the controversy involved is one in my opinion between citizens of different states, but that it appears from the record, that the plaintiff, Isaac H. Selleck, at the time he brought this action, to the then U. S. Circuit Court, for the District of Connecticut, was not a citizen of the State of Michigan, as he represents in his complaint, but was a citizen of Connecticut, and that both of the defendants were also citizens of Connecticut, and that therefore the controversy was not in fact between citizens of different states, and no other ground of jurisdiction appears from the record. The case is dismissed only for the reasons above stated, that is, that the controversy is not between citizens of different states, and secondly, the Circuit Court of the United States, for the District of Connecticut, to which said action was originally brought, and this, the District Court of the United States, for the District of Connecticut, to which said cause was transferred, by Act of Congress, January 1, 1912, has no jurisdiction.

98 This certificate is made in conformity to the Act of Congress of March 3, 1891, Chapter 517 and the opinion of the Court appearing upon the trial, as set forth in the stenographer's notes, is made a part of the record, and will be certified to and sent up as a part of the proceedings together with this certificate.

JAMES P. PLATT,
U. S. District Judge of the District of Connecticut.

Dated this 19th day of October, 1912.

Approved as to form.
JOHN K. BEACH;
Att'y for Defendants.

99 And thereafter on the 10th day of December, 1912, the plaintiff in error filed his petition for writ of error, assignments of error and bond in error as follows, to-wit:

100 The District Court of the United States for the District of Connecticut.

No. 564. Law.

ISAAC H. SELLECK
vs.
EMMA S. DAVID et al.

Petition for Writ of Error and Order Allowing Same.

Now comes Henry A. Gilbert of Bethel, Connecticut, administrator with the will annexed, of the said Isaac H. Selleck in the above entitled cause, by his attorneys, herein, Noble E. Pierce, Esq., and H. W. Taylor Esq., and says, that on or about the 24th day of October, 1912, final judgment was rendered against him and in

favor of the defendants herein, dismissing this cause for want of jurisdiction, in that the plaintiff testate, the said Isaac H. Selleck, was not a citizen of the State of Michigan, but was a citizen of the State of Connecticut, on and before the bringing of this action, together with costs to the defendants taxed and allowed at $80.80.

That in said judgment and the proceedings herein had prior thereto, in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors, which are on file with this petition.

Therefore the plaintiff prays an order of this Court, allowing said plaintiff to prosecute a writ of error to the Honorable Supreme Court of the United States of America, and that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors, so complained of, and in accordance with the laws of the United States in that behalf made and provided, and that a transcript of the record, proceedings and papers in this case, duly authenticated may be sent to the United States Supreme Court, and that an order be made herein fixing the amount of security which the plaintiff shall give and furnish upon said
101 writ of error, and upon the giving of such security all further proceedings in this court be suspended and stayed, until the determination of said writ of error in the said Supreme Court of the U. S. and your petitioners will ever pray.

NOBLE E. PIERCE,
H. W. TAYLOR,
Attorneys for Plaintiff.

It is ordered that the writ of error above prayed for be allowed this 11th day of December 1912.

JAMES L. MARTIN,
U. S. Judge.

[Endorsed:] No. 564. Dist. Court of U. S., Dist. of Connecticut. Isaac H. Selleck vs. Emma S. David et al. Petition for Writ of Error & Order Allowing Same. Filed Dec. 10, 1912. E. E. Marvin, Clerk. Copy.

102 Dist. Court of the United States for the District of Connecticut.

ISAAC H. SELLECK, Deceased, by HENRY A. GILBERT, Administrator with the Will Annexed,

vs.

EMMA S. DAVID, Admx., et al.

Assignment of Errors and Prayer for Reversal.

Come now, the plaintiff, administrator, in the above entitled cause, by Noble E. Pierce, and H. W. Taylor, his attorneys, and prays for a reversal of the judgment entered in the above entitled cause in favor of the defendants, and against the plaintiff, on or

about the 24th day of October, 1912, as of August 26, 1912, and as ground for reversal set- forth and file- the following, assignment of errors, upon which he will rely on his prosecution of the writ of error in the above entitled cause.

First. The court erred and mistook the law in taking away from the jury, the issue of fact as to the diverse citizenship of the parties to the action, which was raised by the pleadings, as read to the jury, and determining said question of fact, (issue of diverse citizenship) itself, without the intervention of said jury, and against the protest of the plaintiff, and in dismissing said action for alleged want of jurisdiction.

Second. That the court erred and mistook the law, in taking said case away from the jury, against the protest of the plaintiff and deciding said litigated issue of fact as to diverse citizenship, after the pleadings, raising said issue of diverse citizenship, together with the pleadings on the other issues in the case, had been read to the jury, and the plaintiff had introduced substantial evidence, showing that he was a citizen of Michigan, at the time of the bringing of this action, and *and* it was admitted that the defendants were citizens of Connecticut, at the time of the bringing of this action.

103 Third. The Court erred and mistook the law in taking said case away from the jury, and in deciding said litigated issue of fact as to diverse citizenship, itself, and in dismissing said case, for alleged want of jurisdiction, when the evidence on said question of fact, as to the diverse citizenship, was in the light most unfavorable to the plaintiff, simply, conflicting.

Fourth. That the court erred and mistook the law, in not holding and deciding, that the right of trial by jury, on the issue of diverse citizenship, which was raised by the pleadings, and which had been read to the jury, was preserved under Article 7, of the Federal Constitution.

Fifth. The court erred and mistook the law, in refusing to allow any argument, by counsel for the plaintiff, upon either the question of fact, which the court took away from the jury, and decided itself, or upon any question of law, and compelled counsel for the plaintiff, to confine their statements to such claims of law, only, as were in the nature of exceptions to the rulings in the dismissal of the case, previously just announced in that such ruling of refusal to hear any argument prevented a fair opportunity for the presentation of the plaintiff's case, by his counsel, upon both the questions of law and fact.

Sixth. That the refusal of the trial court to listen to any argument upon any question of fact or of law, if the same was a matter of discretion, was, under the facts of record in this case, an abuse of such discretion.

Seventh. The court erred and mistook the law, in holding and deciding that this action could be dismissed under the 1875 Act of Congress, (so-called) by the court alone, and without the intervention of the jury, when a jury trial, was not waived by both of the parties.

Eighth. That the court erred and mistook the law, in not holding

and deciding that after its failure to pass upon the two mo-
104 tions made to dismiss the action and the plaintiff's motion to strike said two motions to dismiss from the files, and the impanelling of the jury, and reading to the jury, the pleadings raising the issues of fact, (including the one raised on the question of diverse citizenship) it had elected to have said issue of diverse citizenship, tried and determined by the jury.

Ninth. The court erred and mistook the law in dismissing said case under said (so-called) 1875 Act of Congress, for the record shows that the court had elected prior to the impanelling of the jury, to have said question of diverse citizenship determined by the jury, and after the impanelling of the jury, it was too late for the court to change its election in this respect, and to hear said evidence, itself, and to dismiss said case under said statute.

Tenth. The court erred and mistook the law in holding and deciding, and in finding on the evidence, that the plaintiff-testate, Isaac H. Selleck, had changed his citizenship, from Michigan, to Connecticut, at the time of the bringing of this action, and in dismissing said action, for alleged want of jurisdiction.

Eleventh. The court erred and mistook the law, in holding and finding that the plaintiff-testate, had changed his citizenship, from Michigan to Connecticut at the time of the bringing of this action, and dismissing the action for alleged want of jurisdiction, because the evidence showed that the plaintiff's removal, from Michigan to Connecticut, did not contemplate a residence in Connecticut, for an indefinite and uncertain time, and with the intent to make Connecticut, his principal and permanent place of residence.

Twelfth. That the court erred and mistook the law, in deciding and finding, that the plaintiff-testate, was a citizen of Connecticut, at the time of the bringing of this action, because the evidence showed that the plaintiff's removal from Michigan to Connecticut, was to last only until the affairs, connected with the estate,
105 of his uncle and the sale of some property, and the so-called Head litigation were completed.

Thirteenth. That it being undisputed that the plaintiff had not voted in Connecticut, and that he had voted in the State of Michigan, up to and including the 1900 State election, for several years, and had resided in said Michigan for several years prior to 1900, and had held public office in Michigan, and performed jury duty in Michigan, and it not appearing that there was any reason, why the plaintiff, as an American citizen, should have refrained from voting in Connecticut, after 1901, if he intended to become a citizen of Connecticut, the court erred and mistook the law, in its decision on the question of diverse citizenship, in not holding and deciding, that the fact of the plaintiff-testate's abstaining from exercising his privilege of an elector in Connecticut, was of such weight and effect, that it established as matter of both fact and law, that there had been no change of citizenship, from Michigan to Connecticut.

Fourteenth. The court, while deciding the question of diverse citizenship, erred and mistook the law, in not holding and deciding

the fact that the plaintiff-testate, had not exercised the electoral privilege in Connecticut, before the bringing of this action, was of such controlling weight and effect, that in law, there could not be imputed to the plaintiff-testate, an intent to change his citizenship, and domicile, from Michigan to Connecticut, prior to the bringing of this action, and that the plaintiff-testate, was a citizen of Michigan when the action was brought, although a resident of Connecticut.

Fifteenth. That the court erred and mistook the law, in holding and deciding that the plaintiff-testate had changed his citizenship, from Michigan to Connecticut, when the evidence failed to convince the mind to a legal certainty, that plaintiff-testate, was a citizen of Connecticut, at the time of the bringing of this action.

Sixteenth. The court erred and mistook the law, in over-
106 ruling the objection of the plaintiff, to the admission of said tax lists, because by the law of Connecticut, all male residents of said State, whether citizens of Connecticut or not, are by section 2313 of the General Statutes of Connecticut, Rev. 1902, obliged to pay a poll tax, (unless exempt), although not an elector and a like liability for a poll tax exists under the charter of the City of Danbury, Section 33 page — then in force on and prior to the bringing of this action.

Seventeenth. The court erred and mistook the law, in deciding and finding upon the evidence that the plaintiff-testate was a citizen of Connecticut, by giving undue and controlling weight to the Tax Lists of the city and town of Danbury, showing listed therein a poll tax against the plaintiff-testate.

Eighteenth. That the Court erred and mistook the law, in giving any weight at all, to said tax lists, because there was no evidence in connection therewith, that the plaintiff-testate became an elector of either the city or town of Danbury, and because the plaintiff-testate, was not asked in cross-examination, when his deposition was taken, to explain said tax lists, or his attention called to them at all.

Nineteenth. That the Court erred and mistook the law, in giving undue and controlling weight, to the copies of said tax lists of the plaintiff-testate, showing the listing therein, of less than $100. worth of personal property, and of a poll tax, in that from said facts of the re-appearing in said Tax Lists said personal property of small value and a poll tax, the court found the domicile of the plaintiff-testate, at the time of the bringing of this action, to be in the city and town of Danbury, and plaintiff-testate a citizen of Connecticut.

Twentieth. That the Court erred and mistook the law in ruling and holding and deciding as follows:

107 Mr. TAYLOR: Here is another point I would *to* raise. Six years have elapsed since the cause of action first accrued, *a* and unless there is a saving statute in the Connecticut statutes, which would allow a new action *ti* be brought, the plaintiff has lost his cause of action, and that it appears from all of the evidence in

the case, that the defendants could have raised the question of jurisdiction by their motion earlier than, April 1911.

The COURT: I don't really think they could raise it until there was some testimony in the case. I don't understand that they ever filed any motion to dismiss until after you took your testimony by deposition, did you, Mr. Beach?

Mr. BEACH: No, sir, it was only after the deposition was taken and in consequence of what we learned there.

The COURT: That was the first time that anything appeared except the pleadings upon which the defendants could base any action at all. But there is no objection to your raising all kinds of questions.

Mr. TAYLOR: We would like to state that the withholding of the motion to dismiss until after the taking of Mr. Selleck's deposition in April, 1911, is no excuse for the laches of the defendant because all of the facts developed in such deposition in relation to his residence in Danbury, and his holdings there, and the tax lists, etc., were open and notorious; facts accessible to the defendants and could have been easily obtained; and nothing new was developed in the deposition but what was presumably within their knowledge.

108 Twenty-first. That in considering the evidence and deciding said question of diverse citizenship, the Court erred and mistook the law by inadvertently placing its decision in part upon the assumption that there appeared any reference in the plaintiff's deposition to said tax list, Church record or plaintiff's alleged statements to witnesses, Star and Selleck offered by the defendants and which constituted substantially all of the evidence presented by the defendants on the trial after the plaintiff's death.

Twenty-second. The Court erred in dismissing said action, because the record shows that the Court failed to give the evidence careful scrutiny which the law required, when the probable result, of the dismissal would be the loss of opportunity to try the action upon its merits and such "loss" would be due to the withholding by defendants of plaintiff's alleged statements to Starr and Selleck, and the church record and tax lists, until after the death of the plaintiff-testate, and the defendants' failure to call the plaintiff-testate's attention to his alleged statements, and said tax lists, and church records, when his deposition was taken, and affording him an opportunity to either deny or explain the same.

Twenty-third. The court when considering the evidence on the question of diverse citizenship erred and mistook the law, in failing to give the plaintiff the benefit of the presumption, that the evidence presented, by the defendants, could have been successfully met, by the plaintiff, if his attention had been called to the same, when his deposition was taken, and in dismissing said action, upon evidence withheld until after the plaintiff's death.

Twenth-fourth. That the averments of diverse citizenship, in the complaint, and the substantial evidence offered by the plaintiff, showing diverse citizenship, after the plaintiff rested his case, placed

109 the burden of proof upon the defendants to adduce evidence which should convince the mind to a legal certainty, that the court in fact had not jurisdiction of the action, and the record fails to show that the defendant maintained said burden of proof.

Twenty-fifth. That the court in dismissing this action, under the Federal Statute, upon the evidence offered at the trial, abused its legal discretion.

PLAINTIFF,
By NOBLE E. PIERCE,
H. W. TAYLOR,
His Attorneys.

110 American Surety Company of New York.

Capital $2,500,000.

Know All Men By These Presents, That we, Henry A. Gilbert of Bethel, Fairfield County, Connecticut, as Principal, and American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and having an office and principal place of business at No. 100 Broadway, Borough of Manhattan, City, County and State of New York, as Surety, are held and firmly bound unto Emma S. David, of Danbury, Connecticut, as sole administratrix with the will annexed of Darius Selleck, late of said Danbury, and Benjamin S. Selleck, of Ridgefield, Connecticut, and Robert Selleck of Syracuse, in the County of Onondaga, and State of New York, as executors of the last will and testament of Benjamin Selleck, late of said Danbury, deceased, in the penal sum of Two Hundred and Fifty (250) Dollars, lawful money of the United States, to be paid to the said Emma S. David, of said Danbury, as administrator with the will annexed of Darius Selleck, late of said Danbury, deceased, and Benjamin S. Selleck of Ridgefield, Connecticut, and Robert Selleck of Syracuse, County of Onondaga, and State of New York, as executors of the last will and testament of said Benjamin Selleck, Deceased, for which payment well and truly to be made, we bind ourselves and each of us, and our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

[On margin:] Henry A. Gilbert.

Sealed with our seals, and signed with our hands, and dated this tenth day of December, 1912.

The condition of this obligation is such, that whereas lately, at and in the District Court of the United States for the District of Connecticut, in a suit in said Court, wherein Henry A. Gilbert, administrator with the will annexed of Isaac H. Selleck, Deceased, was plaintiff, and Emma S. David, administratrix with the will annexed of Darius Selleck, Deceased, and Benjamin S. Selleck, and

Robert Selleck, executors of the last will of Benjamin Selleck, deceased, were defendants, a judgment was rendered against the said Henry A. Gilbert, administrator with the will annexed of the said Isaac H. Selleck, plaintiff and the said Henry A. Gilbert, administrator has obtained a writ of error, of the said United States District Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Emma S. David, administratrix with the will annexed of the said Darius Selleck, and to Benjamin S. Selleck and Robert Selleck, executors of the last will of Benjamin Selleck, Deceased, citing and admonishing them, and each of them, to be and appear in the Supreme Court of the United States, in the city of Washington, on the 9th day of January, 1913, Nineteen Hundred and thirteen.

Now therefore, if the said Henry A. Gilbert, administrator,
111 plaintiff in error as aforesaid, shall prosecute said writ of error to effect, and answer all damages and costs, if he fails to make his plea good, then this obligation shall be void: otherwise to remain in full force and virtue.

HENRY A. GILBERT, [SEAL.]
AMERICAN SURETY COMPANY
OF NEW YORK,
By R. E. BENHAM,
Resident Vice-President.

Attest:
M. KUENHOLD,
Resident Assistant Secretary.

[SEAL.]

Bond Approved.

JAMES L. MARTIN,
U. S. D. Judge.

112 *Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

The first quarterly meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Wednesday, January 17, 1912, at 12 o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 12, 1911, for the purpose of nominating officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for * * *

Place.	Resident Vice Presidents.	Resident Assistant Secretaries.
Hartford, Conn.	Charles M. Joslyn	Richard E. Benham
	R. E. Benham	Chas. E. Parker
	Sylvester C. Dunham	R. H. Hovey
	Alfred Spencer, Jr.	M. Kuenhold
	George H. Burt	
	Geo. H. Gilman	
	Roger H. Hovey	

* * * * * * *

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballott on behalf of the Trustees present for the officers, members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

* * * * * * *

113 "The following resolution was adopted:

"Resolved, that the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK,
County of New York, ss:

I, H. A. Reiss, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 19th day of January, 1912.

[SEAL.]

H. A. REISS,
Assistant Secretary.

114 And thereafter on the 10th day of December, A. D. 1912, a stipulation of the parties as to what the transcript in error should contain, was filed in the words and figures following, to-wit:

District Court of the United States, District of Connecticut, October ——, 1912.

ISAAC H. SELLECK
vs.
BENJAMIN SELLECK et al.

To the Clerk of said Court:

Please to take notice that the parties hereto, pursuant to section 1, Rule 8 of Rules of Practice of the Supreme Court of the United States promulgated December 22, 1911, have stipulated that the following portions of the record shall constitute the transcript or record on the writ of error to the Supreme Court, to-wit:

1. The writ of error, with acceptance of service, by defendants endorsed thereon.

2. Return of the Judges of the District Court, to said writ of error.

(*a*) Original complaint (officer's return of service thereon omitted).

(*b*) Substituted complaint.

(*c*) Answer of the defendant. Exhibit A to the 4th Defense omitted therefrom, as no part of the pleadings, per Opinion, filed May 2, 1911.

(*d*) Replies filed.

(*e*) Jury panel.

(*f*) Judgment file.

(*g*) Common Law record of judgment dismissing suit for want of jurisdiction.

(*h*) Judge's certificate under Section 5 of Chapter 517 of the Act of March 3, 1891 (26 State. — Large page 827).

115 3. Order of July 17, 1912, extending time for plaintiff to file and complete his bill of exceptions, and other papers necessary for taking out writ of error, and service thereof.

4. Motion and order of October 4th, 1912, extending time for signing and allowance of bill of exceptions, taking out writ of error, etc., to December 24, 1912.

5. Bill of Exceptions as allowed and order allowing same.

6. Petition for writ of error.

7. Assignment of errors.

8. Bond in error.

9. Clerk's certificate.

10. Citation with endorsement of service thereon.

11. This stipulation and another stipulation omitting depositions from transcript which appear in Bill of Exceptions, etc.

Said transcript to be prepared as required by law, and the

rules of this court, and the rules of the Supreme Court of the United States before the 24th day of December, 1912.

H. W. TAYLOR,
Attorney for the Plaintiff-in-Error.
BRISTOL, STODDARD,
BEACH & FISHER,
Attorneys for the Defendants-in-error.

116 And thereafter on the 16th day of December, A. D. 1912, the parties filed a stipulation as to the printing of the depositions in the words and figures following, to-wit:

United States District Court, District of Connecticut.

Law. #564.

ISAAC H. SELLECK
vs.
BENJAMIN SELLECK et al.

Stipulation.

It is hereby stipulated:

1. That it will not be necessary for the clerk of the Court to certify up the depositions of the plaintiff, Isaac H. Selleck or such part thereof as appear- from the official stenographer's notes set out in the Bill of Exceptions, to have been read to the Court and Jury, on the trial hereof, and the depositions of George A. Turner, A. L. Sawyer and Fred Noreross as appears from the official stenographer's notes, set out in the bill of exceptions, to have been read to the Court and Jury, on the trial hereof.

2. It is also stipulated that that part of the deposition of the plaintiff which appears from the official stenographer's notes, as set forth in the Bill of Exceptions *were* actually read to the Court and Jury, upon the trial hereof, and the depositions of George A. Turner, A. L. Sawyer and Fred*d* Noreross *which* each appears from the stenographer's notes, set out in the Bill of Exceptions, were actually read to the Court and Jury, upon the trial hereof, can be used upon the writ of error with the same force and effect, as the original depositions.

H. W. TAYLOR,
For Plaintiff.
JOHN K. BEACH,
For Defendants.

117 UNITED STATES OF AMERICA,
District of Connecticut, ss:

I, Edwin E. Marvin, Clerk of the District Court of the United States for the District of Connecticut, in the Second Circuit,, do hereby certify that the foregoing pages numbered from 3 to 116,

inclusive, contain a true transcript as limited by the stipulation contained herein, of the record and proceedings had in said Court, in the case entitled Isaac H. Selleck, alleged in the complaint to be of Menominee, Michigan, and Henry Gilbert, Administrator, of Bethel, Connecticut, with the will annexed of said Isaac H. Selleck, Deceased, plaintiff in error, plaintiff below, against Emma S. David, of Danbury, Connecticut, as administratrix, with the will annexed of Darius Selleck, late of Danbury, and Benjamin S. Selleck, of Ridgefield, Connecticut and Robert L. Selleck, of Syracuse, in the County of Onondaga, and State of New York, as executors of the last will and testament of said Benjamin Selleck, deceased, defendant- in error, defendants below, as the same remain of record and on file in my office.

I further certify that the clerk's fees for making the return of this writ of error are $80.75, and have been paid to me by Howard W. Taylor, attorney for the plaintiff in error.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of Hartford, in the District of Connecticut, in the Second Circuit, this 8th day of January, 1913, and of the independence of the United States, the one hundred and thirty-seventh.

[SEAL.] E. E. MARVIN, *Clerk.*

118 *Citation.*

Supreme Court of the United States of America.

The United States of America to Emma S. David, of Danbury, Connecticut, administratrix with the will annexed of Darius Selleck, late of Danbury, deceased, and to Benjamin B. Selleck, of Ridgefield, Connecticut, and to Robert L. Selleck, of Syracuse, Onondaga County, New York, executors of the last will of Benjamin Selleck, late of said Danbury, deceased, Greeting:

You and each of you, are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, on the 9th day of January, 1913, pursuant to a writ of error filed in the Clerk's Office of the District Court, for the District of Connecticut, wherein Henry A. Gilbert of Bethel, Connecticut, administrator with the will annexed of the last will and testament of Isaac H. Selleck, alleged to be late of Menominee County, Michigan, deceased, — plaintiff-in-error and you are defendants-in-error, to show cause, if any there be, why the judgment rendered against the plaintiff-in-error as in said writ of error mentioned, should not be corrected and speedy justice should not be done the parties in that behalf.

Witness the Honorable James L. Martin, specially designated and

acting Judge for the District of Connecticut, this 10th day of December, A. D., 1912.

JAMES L. MARTIN,
U. S. D. Judge.

December 19, 1912.

Due and legal service of above citation is hereby accepted.

BRISTOL, STODDARD,
BEACH & FISHER,
JOHN K. BEACH,
Attorneys for Defendant.

Endorsed on cover: File No. 23,499. Connecticut D. C. U. S. Term No. 424. Henry A. Gilbert, administrator of Isaac H. Selleck, deceased, plaintiff in error, vs. Emma S. David, administratrix of Darius Selleck, deceased, and Benjamin S. Selleck and Robert Selleck, executors of Benjamin Selleck, dec'd. Filed January 13th, 1913. File No. 23,499.

Office Supreme Court, U. S.
OCT 22 1914
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 97.

HENRY A. GILBERT, ADMINISTRATOR, ETC., PLAINTIFF IN ERROR,

vs.

EMMA S. DAVID, ADMINISTRATRIX, ETC., ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

BRIEF FOR THE PLAINTIFF IN ERROR.

HOWARD W. TAYLOR,
Counsel for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 97.

HENRY A. GILBERT, ADMINISTRATOR OF ISAAC H. SELLECK, DECEASED, PLAINTIFF IN ERROR, PLAINTIFF BELOW,

vs.

EMMA S. DAVID, ADMINISTRATRIX OF DARIUS SELLECK, DECEASED, AND BENJAMIN S. SELLECK AND ROBERT SELLECK, EXECUTOR OF BENJAMIN SELLECK, DECEASED, DEFENDANTS IN ERROR, DEFENDANTS BELOW.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

BRIEF FOR THE PLAINTIFF IN ERROR.

Statement of Facts.

This cause comes before this court by writ of error to the District Court of the United States for the District of Connecticut upon the question of the propriety of the

action of the trial court in dismissing the action for want of jurisdiction.

The dismissal, as disclosed by the trial judge's certificate, was based *solely upon the ground that the record does not show that the controversy involved was between citizens of different States* (Rec., ff. 59-60). It is plaintiff in error's claim that the judgment was not only erroneous upon the facts proven, but that *it was made without any proper pleadings to base it upon*, and that because the defendants (although the evidence discloses that some of them knew of the alleged lack of diversity of citizenship in 1901) waited to attempt to raise such question until after the statute of limitations of Connecticut had outlawed a suit upon the cause of action in the Connecticut courts, this court will not go out of its way to sustain the said judgment and thereby assist the defendants in an unworthy effort to escape suit upon the cause of action sued upon in the case at bar.

The action was brought to the fourth Tuesday of April, 1905, to the Circuit Court for the District of Connecticut (Rec., f. 22). A substituted complaint was filed May 24, 1905 (Rec., f. 22). The action was to recover from the defendants upon an agreement they had made with plaintiff, in consideration of the transfer by plaintiff of some valuable property, that they (the defendants) would indemnify and hold plaintiff and his parents pecuniarily harmless for liability upon certain notes; that plaintiff, pursuant to said agreement, transferred said property to defendants, and that plaintiff had subsequently been compelled, on August 2, 1904, by legal action to pay a judgment, based upon the obligation evidenced by said notes, in the sum of $5,422.92, and also $2,500 in defense of said action, no part of which had been repaid him by defendants, although payment thereof had been demanded (Rec., ff. 12-14). In his complaint plaintiff alleged that he was a citizen of the State of Michigan and that the defendants were citizens of the State of Connecticut (Rec., f. 11).

An action of this character was maintainable in the courts of Connecticut only within three years. See Gen. Statutes of Connecticut, sec. 1114, which reads as follows:

> "*Action on oral contract to be brought within three years.*—Excepting actions for a debt due by book, or actions founded on proper subjects of book debt, no action founded upon any express contract or agreement not reduced to writing, or to which some note or memorandum shall not be made in writing and signed by the party to be charged therewith or his agent, shall be brought but within three years after the right of action shall accrue."

And there is no saving clause in the Connecticut statutes by which the institution of an action in a wrong forum extends the period of limitation.

Plaintiff therefore had nothing to gain by an untruthful statement as to his citizenship. Had he believed himself to be a citizen of Connecticut, the courts of that State were open to him and he could have prosecuted his action therein. This is not, therefore, a case of a willful fraud attempted to be practiced upon the court, but *an honest attempt to invoke the jurisdiction of a Federal court, which the plaintiff believed himself entitled to invoke.*

On the said 4th Tuesday of April, 1905, the defendant Emma S. David, administratrix, appeared, as did Benjamin Selleck, who was then alive (Rec., f. 22). *Although said Emma S. David, as she afterwards testified at the time the case was dismissed, had had a conversation with the plaintiff shortly after his coming to Connecticut in 1901 as to where he intended to make his home (Rec., f. 25), and consequently had information as to his citizenship at the time she appeared in 1905, nevertheless, instead of at once filing a plea to the jurisdiction and raising the question of lack of jurisdiction by reason of plaintiff's citizenship being in Connecticut, she not only failed so to do, but did not even answer until after the expiration of three years (the period of limitation) from said August 2, 1904,* when on the 20th

day of August, 1907, she filed an answer (Rec., f. 22), in which, in answer to the allegation as to plaintiff's citizenship, she denied knowledge or information as to plaintiff's citizenship and left him to the proof thereof (Rec., f. 16), and included in her answer four separate defenses upon the merits of the action (Rec., ff. 16-18).

Under the practice in Connecticut a denial of knowledge or information as to a paragraph of a pleading amounted to a denial of the allegation made, viz., that plaintiff was a citizen of Michigan.

The case then dragged along until 1911, being continued three or four times at defendant's request (Rec., f. 39), when defendants filed two motions to dismiss for want of jurisdiction, one being filed April 27 and the other October 5 (Rec., f. 23). On October 6 plaintiff filed a motion to strike the last motion from the files (Rec., f. 23), claiming that the motion was an irregular way of raising the question of lack of jurisdiction, as that should be done by a plea to the jurisdiction, and that the motions were made too late, as seven years had elapsed since the cause of action arose and defendants had joined issue six years before (Rec., ff. 89, 90). *Upon all of these motions the court took no action and made no order* (Rec., f. 27).

Nothing further was done until June 4, 1912, when *a jury was impaneled and sworn and the substituted complaint, answer and reply were read to them* (Rec., f. 27).

Thereafter counsel for defendant suggested that a question of the citizenship of plaintiff was in issue and suggested the propriety of trying that question first (Rec., f. 28).

This suggestion the court agreed to follow, and, addressing the jury, said:

> "I think, gentlemen of the jury, you probably understand that the first allegation of this complaint, is that the plaintiff is a citizen of the State of Michigan; defendants of the State of Connecticut—it is admitted that they are citizens of Connecticut but they leave the plaintiff to his proof as to whether the

plaintiff was a citizen of the State of Michigan. And my jurisdiction in this court depends upon the diversity of the citizenship, at the time the suit was brought. Therefore, I am going to listen to testimony on the question whether the plaintiff was a citizen of the State of Michigan, at the time the suit was brought."

(Rec., f. 28.)

No new issue was framed by the court, and instead of defendant being required to produce evidence that plaintiff was a citizen of Connecticut, the plaintiff was called upon by the court to produce affirmative evidence of his citizenship in Michigan. After he had produced his evidence upon this question the court then heard evidence offered by defendant upon the question, and at the close of such evidence refused to permit the jury to pass upon the question of the citizenship of the plaintiff and himself dismissed the case for lack of jurisdiction, holding that the said evidence disclosed that plaintiff was a citizen of Connecticut. The evidence thus produced before the court and jury upon which the court decided plaintiff's citizenship was in Connecticut was as follows:

Plaintiff's wife was a western woman. Plaintiff had resided in Michigan, where his wife's family and friends lived (Rec. ff. 33, 47), from 1885, upon property owned by him but held in his wife's name (Rec., f. 48). He had been both a voter and supervisor of his ward there (Rec., ff. 30, 60), and had voted in 1900 (Rec., f. 61). He also did jury duty there (Rec., f. 39). He continued to live there with his wife and mother until after the death of his uncle Jarvis Selleck (Rec., f. 39), who died in February, 1900, in Connecticut (Rec., f. 30). He left on one hour's notice to attend the funeral (Rec., f. 45), and remained in Connecticut until June, when he returned to Michigan and remained there until January or February, 1901 (Rec., f. 45), when he again went back to Connecticut to look after his interests in the estate of said uncle, of which estate he

was a joint heir with his uncle Darius (Rec., f. 3). He subsequently remained there for the purpose of endeavoring to sell his property in Connecticut, and also to defend the suit upon which the judgment was obtained, the payment of which is the basis of the present action (Rec., f. 31), which suit had been instituted August 24, 1900 (Rec., f. 12).

Plaintiff's deposition was taken before his death, and he, who assuredly knew his intent better than any one else in the world, swore that his residence was in Michigan, and that he had voted there and *never voted elsewhere* (Rec., f. 30), and that he always intended to return there as soon as he disposed of his property in Connecticut (Rec., f. 36). He came East alone, leaving his wife and mother in Michigan (Rec., f. 33). An opportunity to sell his house in Michigan arose later, and his wife, in whose name the house was, sold the house and came East with his mother and joined him in 1901 (Rec., ff. 32 and 33). For a few months they all boarded with a cousin at Bethel, Conn., and then moved into a house plaintiff had inherited in Danbury, and have continued to live there since (Rec., f. 33). When leaving Michigan plaintiff was very careful to leave a desk with his brother-in-law (Rec., ff. 35, 36, and 57), as he expected to return in about three years, and *left it for the express purpose of retaining his citizenship there* (Rec., f. 57). He, however, found it difficult to dispose of his interest in Connecticut, and was forced to live here longer than he expected, in order to prevent a sacrifice of his interests there (Rec., f. 39). During all this time he retained his affiliations with his Masonic Lodge in Michigan and paid dues there (Rec., f. 36). *He never voted in Connecticut (Rec., f. 30), and was not even made a voter* (Rec., f. 62).

That he intended to return to Michigan up to the time this suit was brought, which is all we are concerned with, as the law is clear that a change of citizenship after suit is brought does not oust the court of jurisdiction, was sworn

to by himself before his death (Rec., ff. 30, 31, 36), by his wife (Rec., f. 46), who next to him was in a position to know of his intention, by his brother-in-law (Rec., ff. 37 and 38), by a reputable lawyer of Michigan (Rec., f. 59), and by Mrs. Jennie E. Selleck, the wife of the deceased defendant Benjamin Selleck (Rec., f. 64). Certainly the last three were disinterested witnesses in every sense of the word.

Opposed to this testimony was that of two members of the Selleck family in Danbury (Rec., ff. 72, 73) and an appraiser of the Jarvis Selleck estate (Rec., f. 70), who testified to remarks of the deceased plaintiff indicative in some degree of an intent to make Danbury his home. These alleged conversations were not called to the plaintiff's attention when he gave his deposition before his death, and plaintiff is not now, of course, in a position to offer proof in denial thereof, as death has sealed his lips. Moreover, all these conversations were general and two of them referred to a time when plaintiff was in Connecticut for a few months following his uncle's death (Rec., ff. 70, 73), and at a time when he admittedly had not determined definitely what he would do. In addition, it appears that on a few occasions a horse valued at $50 and a wagon at $25, and a poll tax appeared upon his tax list at Danbury, Connecticut, and he seems also to have once signed a call for a church meeting, although there appears to be no evidence in the case that a person, in order to sign a call for a church meeting, must be a citizen of the State or even a resident of the town.

The tax lists in evidence show that upon the tax lists of 1902, 1903, and 1904 of the town of Danbury, the poll tax appeared, but was not carried out, either under the owner's valuation or the assessor's valuation. In the tax list of the city of Danbury for the years 1903 and 1904 the poll tax appears, and under the owner's valuation was carried out in the sum of $1. (See exhibits, ff. 90-95, inc.)

The statute in Connecticut in regard to the payment of

poll taxes to towns is contained in section 2313 of the General Statutes of 1902 and reads as follows:

> "Every male person between the ages of twenty-one and seventy years shall pay a poll tax of one dollar for town and State taxes."

The provisions of the charter of the city of Danbury authorizing a poll tax, its assessment and collection, appear in the 1902 revision of the charter, but were operative in the year 1898, and of course control the case at bar.

Section 25, page 35, authorizes the levy of the poll tax. This section in the first part thereof creates a board of estimate and taxation, to go into effect "on the first day of March, 1898." That part of said section which provides for the levy of a poll tax reads as follows:

> "Said board, in legal meeting convened, shall have power to levy taxes on the polls and the estate within the limits of said city for such purposes as said city is by law authorized to levy taxes."

Section 26, page 35, of the charter relates to the duties of collectors of taxes, and in part provides that—

> "the collector of taxes having duly qualified and received a warrant signed by the mayor, shall have the same powers as the collector of town taxes."

Section 27, page 36, concerns assessors and board of relief. The first part of said section provides for the appointment of two assessors. The last part of said section constitutes the mayor, president of the board of aldermen, and president of the board of councilmen, the board of relief, and that part of said section authorizing the *poll tax*, provides that the assessors

> "shall make out a correct assessment list of all the *polls* and ratable estate within the limits of said city, or liable to taxation by said city, setting the polls in the list at one hundred dollars each."

That the provisions of the charter of the city of Danbury will be taken judicial notice of by the courts of Connecticut is decided beyond question in the cases of Nichols *vs.* Ansonia, 81 C., 229, and Fiske *vs.* Hartford, 69 C., 390, and therefore will be taken judicial notice of by the Federal courts in cases tried in Connecticut on the law side of the court, under the rules of practice of the Federal courts. It will be noticed that neither statute is confined to persons inhabitants of Connecticut, but extends to persons even temporarily resident therein. Authorities will be cited hereinafter to show that statutes requiring male inhabitants of the State to pay poll tax are not restricted to such inhabitants as are citizens, but applies to resident aliens. The payment of a poll tax in Connecticut has not therefore the significance which attaches to it in those States which only exact it of its permanent inhabitants.

Under the circumstances described above and upon the evidence above stated, the trial court dismissed the case for want of jurisdiction, due to lack of diversity of citizenship.

Assignments of Error.

The assignments of error are twenty-nine in number, but assignments 1-7, inclusive, and 22 will not be pressed on this brief. The plaintiff in error, however, respectfully requests the court that if the omitted assignments of error, or even errors "not assigned or specified," are essential to a reversal of the judgment below, that the court, under section 4, rule 21, will act upon such omitted or non-assigned errors. The assignments to be considered therefore are the following:

> Eighth. That the court erred and mistook the law, in not holding and deciding that after its failure to pass upon the two motions made to dismiss the action and the plaintiff's motion to strike said two motions to dismiss from the files, and the impaneling of the jury, and reading to the jury, the pleadings raising the issues of fact (including the one raised on the

question of diverse citizenship), it had elected to have said issue of diverse citizenship, tried and determined by the jury.
(Rec., p. 62.)

Ninth. The court erred and mistook the law in dismissing said case under said (so-called) 1875 act of Congress, for the record shows that the court had elected prior to the impaneling of the jury, to have said question of diverse citizenship determined by the jury, and after the impaneling of the jury, it was too late for the court to change its election in this respect, and to hear said evidence, itself, and to dismiss said case under said statute.
(Rec., p. 63.)

Tenth. The court erred and mistook the law in holding and deciding, and in finding on the evidence, that the plaintiff-testate, Isaac H. Selleck, had changed his citizenship from Michigan to Connecticut at the time of the bringing of this action, and in dismissing said action for alleged want of jurisdiction.
(Rec., p. 63.)

Eleventh. The court erred and mistook the law, in holding and finding that the plaintiff-testate, had changed his citizenship, from Michigan to Connecticut at the time of the bringing of this action, and dismissing the action for alleged want of jurisdiction, because the evidence showed that the plaintiff's removal from Michigan to Connecticut, did not contemplate a residence in Connecticut, for an indefinite and uncertain time, and with the intent to make Connecticut, his principal and permanent place of residence.
(Rec., p. 63.)

Twelfth. That the court erred and mistook the law, in deciding and finding, that the plaintiff-testate, was a citizen of Connecticut, at the time of the bringing of this action, because the evidence showed that the plaintiff's removal from Michigan to Connecticut, was to last only until the affairs, connected with the

estate, of his uncle and the sale of some property, and the so-called Head litigation were completed.

(Rec., p. 63.)

Thirteenth. That it being undisputed that the plaintiff had not voted in Connecticut, and that he had voted in the State of Michigan, up to and including the 1900 State election, for several years, and had resided in said Michigan for several years prior to 1900, and had held public office in Michigan, and performed jury duty in Michigan, and it not appearing that there was any reason, why the plaintiff, as an American citizen, should have refrained from voting in Connecticut, after 1901, if he intended to become a citizen of Connecticut, the court erred and mistook the law, in its decision on the question of diverse citizenship, in not holding and deciding, that the fact of the plaintiff-testate's abstaining from exercising his privilege of an elector in Connecticut, was of such weight and effect, that it established as matter of both fact and law, that there had been no change of citizenship, from Michigan to Connecticut.

(Rec., p. 63.)

Fourteenth. The court, while deciding the question of diverse citizenship, erred and mistook the law, in not holding and deciding the fact that the plaintiff-testate, had not exercised the electoral privilege in Connecticut, before the bringing of this action, was of such controlling weight and effect, that in law, there could not be imputed to the plaintiff-testate, an intent to change his citizenship, and domicile, from Michigan to Connecticut, prior to the bringing of this action, and that the plaintiff-testate, was a citizen of Michigan when the action was brought, although a resident of Connecticut.

(Rec., p. 63.)

Fifteenth. That the court erred and mistook the law, in holding and deciding that the plaintiff-testate had changed his citizenship, from Michigan to Connecticut, when the evidence failed to convince the mind to a legal certainty, that plaintiff-testate,

was a citizen of Connecticut, at the time of the bringing of this action.

(Rec., p. 64.)

Sixteenth. The court erred and mistook the law, in overruling the objection of the plaintiff, to the admission of said tax lists, because, by the law of Connecticut, all male residents of said State, whether citizens of Connecticut or not, are by section 2313 of the General Statutes of Connecticut, Rev. 1902, obliged to pay a poll tax (unless exempt), although not an elector and a like liability for a poll tax exists under the charter of the city of Danbury, section 33, page —, then in force on and prior to the bringing of this action.

(Rec., p. 64.)

Seventeenth. The court erred and mistook the law, in deciding and finding upon the evidence that the plaintiff-testate was a citizen of Connecticut, by giving undue and controlling weight to the tax lists of the city and town of Danbury, showing listed therein a poll tax against the plaintiff-testate.

(Rec., p. 64.)

Eighteenth. That the court erred and mistook the law, in giving any weight at all, to said tax lists, because there was no evidence in connection therewith, that the plaintiff-testate became an elector of either the city or town of Danbury, and because the plaintiff-testate, was not asked in cross-examination, when his deposition was taken, to explain said tax lists, or his attention called to them at all.

(Rec., p. 64.)

Nineteenth. That the court erred and mistook the law, in giving undue and controlling weight to the copies of said tax lists of the plaintiff-testate, showing the listing therein, of less than $100 worth of personal property, and of a poll tax, in that from said facts of the reappearing in said tax lists said personal property of small value and a poll tax, the court found the domicile of the plaintiff-testate, at the time of the bringing of this action, to be in the

city and town of Danbury, and plaintiff-testate a citizen of Connecticut.

(Rec., p. 64.)

Twentieth. That the court erred and mistook the law in ruling and holding and deciding as follows:

Mr. TAYLOR: Here is another point I wish to raise. Six years have elapsed since the cause of action first accrued, and unless there is a saving statute in the Connecticut statutes, which would allow a new action to be brought, the plaintiff has lost his cause of action, and that it appears from all of the evidence in the case, that the defendants could have raised the question of jurisdiction by their motion earlier than April, 1911.

The COURT: I don't really think they could raise it until there was some testimony in the case. I don't understand that they ever filed any motion to dismiss until after you took your testimony by deposition, did you, Mr. Beach?

Mr. BEACH: No, sir, it was only after the deposition was taken and in consequence of what we learned there.

The COURT: That was the first time that anything appeared except the pleadings upon which the defendants could base any action at all. But there is no objection to your raising all kinds of questions.

Mr. TAYLOR: We would like to state that the withholding of the motion to dismiss until after the taking of Mr. Selleck's deposition in April, 1911, is no excuse for the laches of the defendant because all of the facts developed in such deposition in relation to his residence in Danbury, and his holdings there, and the tax lists, etc., were open and notorious; facts accessible to the defendants and could have been easily obtained; and nothing new was developed in the deposition but what was presumably within their knowledge.

(Rec., p. 64.)

Twenty-third. The court when considering the evidence on the question of diverse citizenship erred and mistook the law, in failing to give the plaintiff the benefit of the presumption, that the evidence

presented by the defendants, could have been successfully met by the plaintiff, if his attention had been called to the same, when his deposition was taken, and in dismissing said action, upon evidence withheld until after the plaintiff's death.

(Rec., p. 65.)

Twenty-fourth. That the averments of diverse citizenship, in the complaint, and the substantial evidence offered by the plaintiff, showing diverse citizenship, after the plaintiff rested his case, placed the burden of proof upon the defendants to adduce evidence which should convince the mind to a legal certainty, that the court in fact had not jurisdiction of the action, and the record fails to show that the defendant maintained said burden of proof.

(Rec., p. 65.)

Twenty-fifth. That the court in dismissing this action, under the Federal Statute, upon the evidence offered at the trial, abused its legal discretion.

(Rec., p. 66.)

Twenty-sixth. The court erred in ruling and deciding that the pleadings in the case at bar properly raised the question of lack of diversity of citizenship of the parties.

Twenty-seventh. The court erred in not ruling and deciding that under the pleadings as they stood in the case at bar, he was not entitled to consider the question of alleged lack of jurisdiction due to alleged lack of diversity of citizenship.

Twenty-eighth. The court erred in not ruling and deciding that as the pleadings stood, he could not consider the question of alleged lack of jurisdiction due to alleged lack of diversity of citizenship, without first directing the joining of a proper issue thereof by the filing of proper pleadings.

Twenty-ninth. The court erred in its said order or judgment of dismissal, for the finding to support the same was outside of any properly framed pleadings to raise said issue, and the order and judgment was a nullity.

ARGUMENT.

Assignments of error 8, 9, and 25-29, inclusive, involve but one question of law and will therefore be discussed together. The same situation exists as regards assignments 10-19, inclusive, 22 and 23, as to which therefore the same course will be pursued. Assignments 20 and 23 will also be discussed together.

The three questions of law involved are respectively that the court erred in three vital particulars:

1. By holding that under the pleadings as they stood at the time he had himself a right to dismiss for want of jurisdiction, due to lack of diversity of citizenship.

2. By holding that the facts proven showed plaintiff to be a citizen of Connecticut.

3. By failing to hold that defendant's laches in failing to raise the question of jurisdiction until after the statute of limitations of Connecticut had run against the cause of action alleged in the complaint required the court to refuse to consider the question of alleged lack of jurisdiction.

These questions will now be discussed separately.

POINT I.

Assignments of Error 8, 9, and 25-29, inclusive.

Under the pleadings as they stood the court was without power to dismiss the case for want of jurisdiction due to lack of diversity of citizenship, and the order or judgment of dismissal was a nullity.

Since the act of March 3, 1875 (18 Statutes at Large, 472; U. S. Compiled Laws 1901, p. 511), the trial court has had the right to elect whether he would himself try a ques-

tion as to diversity of citizenship or whether he would submit the matter to the jury as a separate and distinct issue. This statement is supported by the case of Wetmore *vs.* Rymer, 169 U. S., at page 120, where it is said:

> "In such case whether the question was raised by the defendant or by the court on its own motion, the court might doubtless order the issue to be tried by the jury. * * *
>
> "But the questions might arise in such a shape that the court might consider and determine them without the intervention of a jury. * * *
>
> "*But whether the judge shall elect to submit the issues to the jury, or to himself here determine them,* it is the manifest meaning of this legislation that in either event the parties are not to be concluded by the judgment of the circuit court." (Italics ours.)

In many cases the question has been submitted to the jury as a separate question and usually a plea in abatement has been filed. Among the many cases in which the question has been submitted to the jury are the following:

Jones *vs.* League, 18 Howard, 76.

Ry. Co. *vs.* Ohle, 117 U. S., 123.

Rucker *vs.* Bolles, 80 Fed. (C. C. A.), 504.

Terry *vs.* Day, 107 Fed., 50.

Lebensberger *vs.* Schofield, 139 Fed., at 382.

Kirven *vs.* Virginia-Carolina Chemical Co., 145 Fed., 288.

Where the plaintiff's pleading sets out the necessary diverse citizenship of the party, the burden of *both* allegation and proof to the contrary rests upon the party who seeks to defeat the jurisdiction.

National Masonic Accident Asso. *vs.* Sparks, 83 Fed., 225, syl. 1.

Wiemer *vs.* Louisville Water Co., 130 Fed., 244, syl. 1.

Kilgore *vs.* Norman, 119 Fed., 1006, syl. 3.

Foster *vs.* Ry. Co., 56 Fed., 434, syl. 1.
Adams *vs.* Shirk, 117 Fed., at 805.
Gaddie *vs.* Main, 147 Fed., 955.
Hill *vs.* Walker, 167 Fed., at 248.
Chase *vs.* Wetzlar, 225 U. S., 79.

Whether the court elect to submit the question to the jury or to determine it himself, *its proper issue must be made in the pleadings and only evidence pertinent to the issues made by the party or to the inquiry instituted by the court can be considered.* This is so held in the following cases:

In Hartog *vs.* Memory, 116 U. S., at page 590, it is said:

> "Neither party has the right, however, *without pleading at the proper time and in the proper way*, to introduce evidence, the only purpose of which is to make out a case for dismissal. *The parties cannot call on the court to go behind the averments of citizenship in the record, except by a plea to the jurisdiction, or some other appropriate form of proceeding.* The case is not to be tried by the parties as if there was a plea to the jurisdiction, when no such plea has been filed. *The evidence must be directed to the issues, and it is only when facts material to the issues show there is no jurisdiction that the court can dismiss the case* upon the motion of either party. *If, in the course of a trial, it appears by evidence which is admissible under the pleadings, and pertinent to the issues joined*, that the suit does not really and substantially involve a dispute of which the court has cognizance, or that the parties have been improperly or collusively made or joined for the purpose of creating a cognizable case, the court may stop all further proceedings and dismiss the suit.
>
> "In Williams *vs.* Nottawa, *supra*, the record showed that one of the issues to be tried was whether Williams, the plaintiff, was the real holder and owner of the bonds sued on, and *the evidence showing the collusion, for which we ordered the suit to be dismissed, was all material and pertinent to that issue.* And in Farmington *vs.* Pillsbury, 114 U. S., 138; S. C., 5 Sup. Ct. Rep., 807, one of the defenses was that

Pillsbury, the plaintiff, was not the *bona fide* holder of the coupons in suit, but that they were placed in his hands for the purpose of being sued on in the courts of the United States. The case came here on special findings applicable to that issue, and what we then said was in answer to the question certified on those findings. Beyond this, no doubt, *if, from any source, the court is led to suspect that its jurisdiction has been imposed upon* by the collusion of the parties or in any other way, *it may at once of its own motion* cause the necessary inquiry to be made, *either by having the proper issue joined and tried, or by some other appropriate form of proceeding*, and act, as justice may require, for its own protection against fraud or imposition.

"But *the evidence on which the circuit court acts in dismissing the suit must be pertinent either to the issue made by the parties, or to the inquiry instituted by the court.*" * * *

"Here the citizenship of both the plaintiff and the defendant, as it was in good faith understood by the plaintiff to be, was stated in the declaration, and it was such as, if truly stated, gave the court jurisdiction. The defendant pleaded to the merits. He alone knew of the mistake as to his citizenship, and purposely omitted to make it known at the time. *Under the issues joined the question of citizenship did not and could not arise.* If a judgment had been rendered on the verdict, Memory would have been bound by it, notwithstanding both he and Hartog were aliens. The record would have estopped him from denying the jurisdiction of the court. *The testimony about his citizenship was irrelevant and wholly immaterial. It did not in any manner relate to the merits of the case.*"

This case was approved in the case of Wetmore *vs.* Rymer, 169 U. S., at 122, where a large part of the language quoted above is quoted with approval.

In Imperial Ref. Co. *vs.* Wyman, 38 Fed., 574, syllabus 2, reads:

"If, however, in the absence of a special plea to the jurisdiction, the court can see by the proof that there

is a jurisdictional question as to the citizenship of the parties, it must, under the fifth section of the judiciary act of 1875, *direct an issue to be made by the pleadings*, try that question, and dismiss the suit if there be no jurisdiction; and therefore an application by the defendant to amend his pleadings in order to raise the question will and must be granted, even after the trial has commenced."

At page 575 it is said:

"The objection of the plaintiff to the testimony is that it is incompetent and irrelevant to the issue made by the pleadings, because, it is urged, a general denial cannot, in the Federal courts, raise this jurisdictional question, since a plea to the merits waives the matter of jurisdiction, if proper averments appear of record to confer it, which can only be challenged by a special plea in that behalf. Such was undoubtedly the law prior to the Practice Conformity Act of 1872, and the Judiciary Act of 1875 (Rev. St., sec. 914; 18 St., 472, sec. 5), and *is still the law, notwithstanding those acts*, in my opinion. * * *

"From this latest case, as far as the court is advised, and from Barry *vs.* Edmunds, 116 U. S., 550; 6 Sup. Ct. Rep., 501, which also considered and construed this section of the act of 1875, it now seems that 'the old rule established by the decisions' has not been changed, but is still established, notwithstanding the act, and a new rule has been superadded, which is that the court may of its own motion institute an inquiry, 'either by having the proper issue joined and tried, or by some other appropriate form of proceeding' as to jurisdiction, and act accordingly. The statute says that the court shall dismiss the suit when it shall appear to the satisfaction of the court that the jurisdiction does not exist, and of course, if this be mandatory, it is the duty of the court always to institute the inquiry above mentioned. *Nevertheless, by this latest decision, it cannot do this without directing a proper issue to be made, which is still a plea in abatement to the jurisdiction as before, unless there be some other 'appropriate form of proceeding' available; and I take it there is none other in actions at law.*

The result is that the defense set up here cannot be made under the general issue, as it may have been done under the said practice in Ohio, *but should have been raised by a plea in abatement*, either generally or specially traversing the capacity of the plaintiff to sue, as was so learnedly pointed out by Mr. Justice Curtis, in the Dred Scott case, *supra*. * * *

"If the suit were in the State court of Ohio, and no question of the jurisdiction of a tribunal of limited powers were involved, but only the simple question of whether the plaintiff be a corporation, that issue, as I understand it to be conceded, might be under the general denial, and no special plea of *nul tiel* corporation, as it is called, would be required. But here again these Federal decisions, and many others that might be cited, all show that *the Federal practice, like that in many other of the States than Ohio, requires that special plea*. If it were not for this fact it might be doubtful, and it may be that it is doubtful notwithstanding that fact, whether this case falls within the rulings of Williams *vs.* Nottawa, *supra*, and Farmington *vs.* Pillsbury, *supra*, in neither of which was there any plea in abatement to the jurisdiction, *and yet the evidence that overthrew the jurisdiction was held pertinent under issues that were made upon the merits*, or within the case of Hartog *vs.* Memory, *supra*, where the plea in abatement was required. To my best judgment is that it falls within the latter case, and must be controlled by it, and *that the evidence which relates to the incorporation of the plaintiff should be held to be incompetent and irrelevant, as the pleadings now stand*. But I am certainly of the opinion that the court should of its own motion obey the imperative command of the act of 1875, and perform the duty imposed upon it by the act and the decisions under it, *by directing an issue to be made to test the question of jurisdiction*."

In Pike County *vs.* Spencer, 192 Fed., 11, syl. 1 reads:

"An averment of the citizenship of the parties in plaintiff's pleading in a Federal court, showing the requisite diversity, is sufficient *prima facie*, to give the court jurisdiction; and unless put in issue by a

> plea to the jurisdiction or other appropriate pleading, supported by affirmative proof, or *unless it appears from evidence in the record which is pertinent to issues joined* that the court was without jurisdiction, an appellate court cannot be required to go behind such averment."

Also see—

Hill *vs.* Walker, *infra*, last part of quotation.

Every Evening Printing Co. *vs.* Butler, 144 Fed. (C. C. A.), 916, *infra*.

In the case at bar there were no issues made in the pleadings either by the parties themselves, or at the direction of the court, which properly raised the alleged jurisdictional defect.

No plea to the jurisdiction was filed although this is the proper way to raise such question in Connecticut, whose practice the trial court in the case at bar should have followed as closely as possible.

See Hart *vs.* Granger, 1 C., at 170, where it is said—

> "A plea to the jurisdiction must be the first plea and must be mixed with nothing else."

Also see:

Perkins *vs.* Perkins, 7 C., 565.

Williams *vs.* Mairs, 72 C., 430, syl. 4.

Nor was there a plea in abatement filed as was done in the cases of Jones *vs.* League, 18 How., 76, and Railway Co. *vs.* Ohle, 117 U. S., 123.

It is true that two motions to dismiss for want of jurisdiction were filed in 1911 (Rec., f. 23). These motions were not considered by the trial court (Rec., f. 27), and his action in refusing to consider them was proper, as they were not a proper way to raise the question of lack of jurisdiction.

See Ill. Cent. R. Co. *vs.* Adams, 180 U. S., 28, where it is said at page 38:

> "But whether this be a question of jurisdiction or not, we think it should be raised either by demurrer to the bill, or by other pleadings in the regular progress of the cause. Motions are generally appropriate only in the absence of remedies by regular pleadings, and cannot be made available to settle important questions of law, or to dispose of the merits of the case."

The only pleadings in the case upon which the court acted in dismissing the case were the substituted complaint, answer, and reply, which were all carefully read to the jury after it had been impaneled and sworn (Rec., p. 27).

The substituted complaint properly alleged diversity of citizenship, for it alleged in paragraph 1 that plaintiff was a citizen of Michigan (Rec., f. 11), and that defendants were citizens of Connecticut (Rec., f. 11).

The answer to these allegations was as follows:

> "As to paragraph 1 the defendants have no knowledge or information as to the citizenship of the plaintiff and leave him to proof thereof. They admit that the defendants are citizens of the State of Connecticut."

A similar answer denying knowledge or information sufficient to form a belief of plaintiff's citizenship was passed upon in Cuthbert *vs.* Galloway, 35 F., 466, and held to be insufficient to raise the question of lack of diversity of citizenship. The reasoning is that the allegation amounts to nothing more than a general denial and that a general denial does not put in issue the question of diversity of citizenship, because the defendant must allege affirmatively that the plaintiff was a citizen of the same State as defendant or deny that he was a citizen of the State alleged or of any other State than that in which defendant was a citizen of, or that he was an alien. The reason for this rule arises from the long line of decisions that if a diversity of citizenship exists the defendant may waive the bringing of the action in the

wrong district and that to deny that plaintiff is a citizen of the State alleged does not therefore, even if proven, show a lack of jurisdiction, as he may be a citizen of another State which is not the State in which defendant is alleged to be a citizen.

In that case, on cross-examination of the plaintiff, he answered questions tending to show his citizenship in the same State as defendant. The defendant asked the court to direct a verdict for want of jurisdiction. The court refused to do so and the case was appealed to the Circuit Court of Appeals.

The court said at page 468:

> "The plaintiff alleged in his complaint that he was a citizen of Pennsylvania, and the defendant of New York. As to this the defendant, in his answer, denied 'any knowledge or information sufficient to form a belief,' and then answered to the merits. On cross-examination the plaintiff answered questions concerning his residence in a manner which tended to show that he was a citizen of New York, and on re-examination that he was a citizen of Pennsylvania. The defendant moved the court to direct a verdict for the defendant for want of jurisdiction. This was denied, and nothing further with reference to this question took place. That, where the jurisdiction of the courts of the United States depends upon citizenship of the parties, the requisite citizenship must be substantially set forth somewhere in the proceedings, appears to have been settled from the earliest times. That, when well set forth, the want of it, if to be relied upon to defeat the jurisdiction, must be set forth in advance of proceeding to the merits, was also well established. In De Wolf *vs.* Raband, 1 Pet., 476, Mr. Justice Story, said:
>
> " 'It has been recently decided by this court, upon full consideration, that the question of such citizenship constituted no part of the issue upon the merits, and must be brought forward by a proper plea in abatement in an earlier stage of the cause.' * * *
>
> "The same doctrine was held in Spencer *vs.* Lapsley, 20 How., 264; Bell *vs.* Rd. Co., 4 Wall., 598;

Rd. Co. *vs.* Harriss, 12 Wall., 65. In the latter case Mr. Justice Swayne said: 'In the proper order of pleading, which is obligatory, a plea in bar waives all pleas, and the right to plead, in abatement.' These cases, with others to the same effect, were decided before the act of 1872, requiring the practice, pleadings, forms, and modes of procedure in civil causes other than equity and admiralty to conform 'as near as may be' to those of the courts of record of the State; and in New York its Code of Civil Procedure, and in the common-law system of pleadings, waivers. This is, however, a rule of law which lies deeper than mere form and mode of procedure, as the language of the distinguished jurists quoted shows, and *that was not altered by this adoption* of the systems of practice of the various States. *Ex parte* Fisk, 113 U. S., 713; 5 Sup. Ct. Rep., 724. In Farmington Village Corp. *vs.* Pillsbury, 114 U. S., 138; 5 Sup. Ct. Rep., 807, decided in 1885, the rule of pleading requiring objection to the jurisdiction on account of citizenship to be brought forward before pleading to the merits as it existed before the act of 1872 was recognized and applied as being still in force. So, also, in Hartog *vs.* Memory, 116 U. S., 588; 6 Sup. Ct. Rep., 521. In this case Mr. Ch. Justice Waite stated the rule as existing up to the act of 1875 (18 St., 470), and *that in its general scope it had not been altered by that act.* * * * This denial of knowledge or information sufficient to form a belief as to the plaintiff's citizenship would seem to be sufficient to put the plaintiff to proof of his statement, *if it was a part of the cause of action, or material to his right of recovery.* Secs. 522, 524. As a plea to the jurisdiction its allegation of want of knowledge or information is wholly immaterial. *A direct denial even of the citizenship alleged by the plaintiff would not be sufficient. Such a plea must be certain to a certain intent in every particular.* 1 Chit. Pl., 444; Scott *vs.* Sandford, 19 How., 393. *In this case it should either allege that the plaintiff was a citizen of New York, the same as the defendant, or deny that he was a citizen of Pennsylvania, or of any other State, or an alien.* And *this denial* or averment, whatever it amounts to, *was pleaded with defenses to*

the merits on which the parties proceed to trial, and was, on the case and principles stated, thereby waived. *There was nothing left for trial but the merit of the cause of action, and this question of jurisdiction appears to have been properly disregarded.*" (Italics ours.)

This case was decided after the enactment of the law of 1875, and reference is made to that act and to the fact that this court, in the case of Hartog *vs.* Memory, 116 U. S., 588, said that that act had not in its general scope altered the rule of pleading to the jurisdiction formerly recognized.

The reasoning of this case is followed in the case of Hill *vs.* Walker, 167 F., at 248, where it is said:

"This will appear if we now return to the propositions announced in the earlier part of this opinion. The first of these was that a proper allegation of jurisdictional facts in the complaint creates a *prima facie* case in favor of jurisdiction. That rule was first clearly stated in Shepard *vs.* Graves, 14 How., 505, at p. 510; 14 L. Ed., 518, as follows:

"'The true doctrine applicable to the question is this: That although in the courts of the U. S. it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, yet, wherever jurisdiction shall be averred in the pleadings, in conformity with the laws creating those courts, it must be taken *prima facie* as existing, and that it is incumbent on him who would impeach that jurisdiction for causes dehors the pleading to allege and prove such causes; that *the necessity for the allegation* and the burden of sustaining it by proof both rest upon the party taking the exception.'

"The other doctrine announced in the same case, that the objection could only be taken by plea, has, of course, been done away with. But so far as we are aware, the rule just quoted is still the rule of the Federal courts. *What the defendant is attempting to do is to challenge the jurisdiction of the court, and in order to do that he must not simply deny the citizenship as alleged in the complaint, but must allege affirmatively facts showing that the plaintiff*

and defendant are citizens of the same State, or make such other averments as shall show directly that the cause is beyond the lawful cognizance of the court.

"The latest declaration of the Supreme Court, that a proper averment showing diversity of citizenship makes out a *prima facie* case in favor of jurisdiction, is in Steigler *vs.* McQuester, 198 U. S., 141; 25 Sup. Ct., 616; 49 L. Ed., 986, where the court says:

" 'The averment in the bill that the parties were citizens of different States was sufficient to make a *prima facie* case of jurisdiction, so far as it depended on citizenship.'

"The same rule is declared by the Circuit Court of Appeals of the 7th Circuit, in Adams *vs.* Shirk, 117 Fed., 801; 55 C. C. A., 25: 'The proper allegation of jurisdictional facts *prima facie* was true.' There the objection was raised in a common-law State by general issue. That, however, is quite as broad a form of pleading as the general denial under the Code, and would admit of any attack upon the jurisdiction of the court which would be possible under a denial in a code State. Furthermore, inasmuch as a Federal statute permits the objection to be raised 'at any time,' it would not be waived in the national courts by pleading to the merits under the one practice any more than the other.

"The fact, however, that the proper averment of the citizenship of the parties in the complaint creates a *prima facie* case in favor of jurisdiction becomes more manifest when we consider the second proposition, namely, that the *prima facie* case thus made remains until it is overcome by evidence which satisfies the mind 'to a legal certainty' that jurisdiction does not in fact exist. This second proposition was also first clearly announced in Shepard *vs.* Graves, 14 How., 505; 14 L. Ed., 518. It was again stated in the case of Barry *vs.* Edmunds, 116 U. S., 550-559, where it is said, when the complaint contains proper jurisdictional allegations, the circuit court is not justified in dismissing a cause for want of jurisdiction—

" 'Unless the facts, when made distinctly to appear on the record, create a legal certainty of the conclusion. Nothing less than this is meant by the

statute when it provides that the failure of its jurisdiction on this count, 'shall appear to the satisfaction of said circuit court.'"

* * * * * * *

"In the case of Hartog *vs.* Memory, 116 U. S., 588; 6 Sup. Ct., 521; 29 L. Ed., 725, the jurisdiction was based upon an allegation of diversity of citizenship. It appears from the record in the lower court (C. C.), 23 Fed., 835, that there was a general denial in the answer. In the course of the trial there was evidence tending to show that both parties were aliens, and the trial court for that reason, on motion of the defendant after verdict, dismissed the cause for want of jurisdiction. After referring to the statute of 1875, and the causes which led to its enactment, the Supreme Court says (page 590 of 116 U. S., p. 522 of 6 Sup. Ct.; 29 L. Ed., 725):

"'Neither party has the right, however, without pleading at the proper time and in the proper way, to introduce evidence the only purpose of which is to make out a case for dismissal. The parties cannot call on the court to go behind the averments of citizenship in the record except by *a plea to the jurisdiction or some other appropriate form of proceeding. The case is not to be tried by the parties as if there was a plea to the jurisdiction when no such plea has been filed. The evidence must be directed to the issues, and it is only when the facts material to the issues show there is no jurisdiction that the court can dismiss the case upon the motion of either party.*'

"In this case there was a general denial, and the evidence also tended strongly to show that the proper diversity of citizenship did not exist. But the Supreme Court ruled that notwithstanding that showing, and notwithstanding a motion made in the trial court challenging its jurisdiction, still the trial court should not dismiss the cause for want of jurisdiction because the plaintiff had had no opportunity, after the question was directly raised, to meet that issue."

The same rule is laid down in the case of Adams *vs.* Shirk, 117 F. (C. C. A.), at page 805, where it is said:

> "The proper allegation of jurisdictional facts, *prima facie*, was true. Simply to deny that Elbert W. Shirk was a citizen of Indiana would not show a want of jurisdiction. He may have been a citizen of some other State than Illinois, where the plaintiff in error was a citizen. That Elbert W. Shirk was a citizen of Illinois was a material and necessary allegation. It was an affirmative averment, the burden of proving which, even under a proper plea in abatement, would have fallen on plaintiff in error. Shepard *vs.* Graves, 14 How., 505, 512; 14 L. Ed., 518; De Sobry *vs.* Nicholson, 3 Wall., 420; 18 L. Ed., 263. Under the plea in the present case, the office of which was no broader than a motion or a suggestion to the court to protect itself from imposition, the burden most assuredly was upon the moving party."

In Nat. Mas. Acc. Asso. *vs.* Sparks, 83 F., 225, syllabi 1 and 2 read:

> "Where a plaintiff's pleading, in the Federal courts, sets out the necessary diverse citizenship of the parties, the burden of both allegation and proof to the contrary rests upon the party who seeks to defeat the jurisdiction.
>
> "A general denial, in a Federal court, is an appeal to the merits, and does not put in issue averments of citizenship, upon which the jurisdiction depends. The matter of jurisdiction is waived unless it is challenged by a special plea."

In Foster *vs.* Ry. Co., 56 F., 434, syl. 1, reads:

> "Where diverse citizenship is sufficiently alleged for the purpose of showing Federal jurisdiction, but is denied by defendant, the burden of proof is on defendant, and, if no proof is offered, the jurisdiction is sustained; and this rule is not changed in those States under whose statutes (adopted by Rev. St., sec. 914) the denial must be made in the answer."

In Every Evening Printing Co. *vs.* Butler, 144 F. (C. C. A.), 916, it was held that where the requisite citizen-

ship was averred in the complaint and no plea to the jurisdiction had been filed that as the case stood the trial court's jurisdiction was not in issue, even though evidence got into the case upon which it was claimed jurisdiction was lost.

At page 919 the court said:

> "As the case stood in the court below its jurisdiction was not in issue. * * * In this state of the record we are bound to recognize the jurisdiction of the court below by reason of the uncontroverted diverse citizenship adequately asserted in the declaration."

The above authorities seem to amply sustain the proposition that upon the pleadings in the case at bar the question of jurisdiction stood admitted.

In spite of this the trial court probably would have a right to direct an inquiry either by the jury or by himself, but we claim he should have compelled the joining of a proper issue and then compelled defendant to assume the burden of proving lack of diversity of citizenship. And if he himself conducted the inquiry the defendants must sustain their proof by evidence showing a legal certainty of the lack thereof. That the test of legal certainty is the proper test, see cases cited *infra*, Point II, this brief.

Instead of following the rules stated above, the court acted upon an issue he considered had been raised by the plaintiff's assertion in the first paragraph of his substituted complaint, that he was a citizen of Michigan, and the defendant's denial of information upon that question.

That the court considered these pleadings to be his authority for considering the question is indisputably shown by what he said to the jury (Rec., f. 28), where he said:

> "You probably understand that the first allegation of this complaint is that the plaintiff is a citizen of the State of Michigan; defendants * * * leave the plaintiff to his proof as to whether the plaintiff was a citizen of the State of Michigan. And my jurisdiction in this court depends upon the diversity of

> the citizenship at the time the suit was brought. Therefore I am going to listen to testimony on the question whether the plaintiff was a citizen of the State of Michigan at the time the suit was brought."

It is thus made clear upon what pleadings the court claimed a right to act.

Instead of then compelling the defendant to proceed the court required the plaintiff to exhaust his testimony on the subject of the citizenship of the plaintiff (Rec., f. 28), and then permitted defendant to introduce evidence upon the same question (Rec., ff. 64-76).

This procedure, we claim, was highly prejudicial to the plaintiff. The only issue which had been framed upon which the question could have been tried in any way at all under the above authorities was the general issue upon the entire cause of action, for the trial of which the jury had been impaneled. Upon the evidence given the court would probably have been justified in submitting the matter to the jury upon a proper instruction that the burden was upon defendant and that they must consider the matter as a separate issue, and he could have and it would have been his duty before thus submitting to have permitted the defendant to have filed an appropriate pleading to raise the question.

In view of the fact that the court took no action at all on either of the two motions to dismiss when his attention was called to the alleged want of jurisdiction by the defendant six years after the case had been in court and had allowed the case to stand to the jury under the answer as filed three years after the action was begun and had neglected to direct the framing of an issue as to the alleged lack of diversity of citizenship, the counsel for the plaintiff had the right to assume that the court had elected to have the jury try the issue, if that issue was to be tried at all, under the pleadings as they were then framed, and that counsel did so believe is evidenced by their conduct throughout the taking of

plaintiff's evidence; and further, it clearly appears in what the court said to counsel upon the introduction of the tax list by the defendant, where the court said:

> "The first mistake you make in my judgment is the idea in your mind that something is going to the jury."
>
> (Rec., f. 65.)

To sum up the matter, the trial court undoubtedly had power to elect whether he would try the case himself upon the framing of a proper issue or whether he would have the jury pass upon the matter by a separate verdict. In view of the fact that the record clearly discloses that there was no proper pleading framed upon which the court could try the matter himself, it is claimed that his impaneling the jury and having the pleadings read to them constituted an election to have the matter tried by the jury, and that thereafter *if he could withdraw the matter from the jury and act upon it himself he would be bound at least to have a proper pleading filed by the defendant and have instituted an inquiry upon such pleading with the defendant maintaining the burden of proof.* That the fact that he did not do so shows as a matter of law an election to submit the matter to the jury, which, if he had the power to thereafter take away from them, he did not do properly in the case at bar, because he caused no proper issue to be framed upon which to try the matter himself.

Nor can his action be supported upon the theory that his action was tantamount to a direction to the jury to find the issue in question for the defendants, because under the law he would not have had that power unless there should first appear a lack of any sufficient evidence to support a verdict in plaintiff's favor upon the issue, and in the case at bar there was a plethora of evidence which, if believed by the jury, would have supported a verdict for plaintiff. Such, for instance, were plaintiff's declarations made in 1901 to his wife and others, and, most potent of all, plaintiff's own evi-

dence as to his intent (and it should be recalled that the question at issue is in its final analysis one wholly of intent).

And if it should be argued by defendant in error that the failure of the court to direct a proper issue to be made was harmless error, because the court has found the ultimate fact of lack of diverse citizenship, the answer is that such claim is unsound, for the reason that it is in direct conflict with the settled rule of practice of the Federal courts that, in whatever way the question of jurisdiction arises, it is the duty of the court to found its judgment of decision upon an issue properly framed for that purpose, because *a finding which is not based upon any pleading is in law a nullity.* Therefore we confidently assert that the failure of the court to cause a proper issue to be framed on the question of jurisdiction leaves his finding of facts without any support in the pleadings and makes such finding invalid and void.

POINT II.

(Assignments 10-19, inclusive, and 23.)

Upon the facts proven the court erred in holding that the evidence showed the plaintiff to be a citizen of the State of Connecticut.

The law is clear that where the complaint contains a proper allegation of diversity of citizenship the burden is upon the defendant to disprove the allegation (see cases cited *supra*, Point I), *and the evidence necessary to do so is required to convince the mind to a "legal certainty" that the court in fact has no jurisdiction.* This statement is supported by the following cases:

In Deputron *vs.* Young, 134 U. S., at page 237, it is said:

> "In Barry *vs.* Edmunds, 116 U. S., 550; 6 Sup. Ct. Rep., 501, it was held that a suit cannot properly be dismissed by a circuit court of the United States, as not involving a controversy within the jurisdiction

> of the court, *unless the facts when made to appear on the record create a legal certainty of that conclusion*. 'Nothing less than this,' said Mr. Justice Matthews, 'is meant by the statute when it provides that the failure of its jurisdiction, on this account, shall appear to the satisfaction of said circuit court.' "

In Wetmore *vs.* Rymer, 169 U. S., at page 122, it is said, in quoting from Barry *vs.* Edmunds, 116 U. S., 550:

> "In making such an order, therefore, the circuit court exercises a legal, and not a personal, discretion, which must be exerted in view of the facts sufficiently proven, and controlled by fixed rules of law. It might happen that the judge, on the trial or hearing of the cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But *upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts* on which the persuasion is based, *when made distinctly to appear on the record, create a legal certainty of the conclusion based on them*. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction, on this account, shall appear to the satisfaction of said circuit court."

In Gaddie *vs.* Main, 147 F., 955, the syl. reads:

> "Where a bill in a Federal court properly alleges the requisite jurisdictional facts, the burden is on the defendant, both to *allege and prove to a legal certainty* the facts relied on to defeat the jurisdiction, and, where he alleges a change of complainant's domicile, *he must show both residence* in the new locality and *the intention to remain there*."

In Howe *vs.* Howe & O. B. B. Co., 154 F., 820, syl. 2 reads:

> "A suit cannot be properly dismissed by a circuit court as not substantially involving a controversy

> within its jurisdiction, *unless the facts when made to appear on the record create a legal certainty of that conclusion.*"

In Pike County *vs.* Spencer, 192 Fed., at page 13, it is said:

> "Turning to the statement of claim, we find the averment that:
>
> "'The plaintiff, T. E. Spencer, is a citizen, resident and inhabitant of the State of New York. The defendant, The County of Pike, State of Pennsylvania, is a county situated in the Middle District in the State of Pennsylvania.'
>
> "This constituted the requisite averment necessary under plaintiff's first pleading, to support the court's jurisdiction. *It made a prima facie case, which continues until it is overcome by evidence which convinces the mind to a legal certainty that the court in fact had not jurisdiction of the action.*" (Italics ours.)

That the plaintiff had been a citizen of Michigan up to the time of his uncle's death is beyond dispute and is not questioned. It is law too elementary to warrant the citation of cases that citizenship once established is presumed to continue until clearly shown to have been changed. Also that to change citizenship there must unite both a change of residence and an intention to acquire a permanent habitation and citizenship elsewhere.

This court has recently, in the case of Williamson *vs.* Osenton, 34 Sup. Ct. Rep., p. 442, decided March 9, 1914, laid down the rule in such clear language that we quote it. It is said:

> "The essential fact that raises a change of abode to a change of domicil is the absence of any intention to live elsewhere (Story, Conflict of Laws, sec. 43); or, as Mr. Dicey puts it in his admirable book, '*the absence of any present intention of not residing permanently or indefinitely in' the new abode.* Confl. L., 2d."

The immediate consideration, therefore, in the case at bar is as to the plaintiff's intent. He testified himself before his death that he intended to return to Michigan, and had only been living in Connecticut until he should be able to dispose of the property he had inherited without sacrifice. His wife testified to the same intention, and she, next to him, would be the person most likely to know of his intent. He left a desk at his home in Michigan for the express purpose of retaining his citizenship in Michigan. There would be absolutely no sense in leaving the desk except for the purpose which he states he had. That he left the desk is substantiated by the testimony of his brother-in-law in Michigan, who testified that he still had it in his care.

A most significant fact is that although he lived for some years in Danbury he *never exercised the elective franchise*. He continued to pay his dues in his Masonic orders in Michigan, a thing no good Mason would have done had he removed his citizenship to Danbury, for in such case he would have joined the local orders and paid dues there. He also expressed an intention to continue to reside in Michigan after he had disposed of his inherited estate to several reputable persons in Michigan, who testified that he had expressed such intention.

The trial court seems to have given undue weight to the fact of actual residence in Connecticut in contradistinction to citizenship, and seems to have felt that because he had lived in Connecticut for some years that slight evidence of intention coupled therewith would be sufficient. Such is not the rule of law under the authorities above quoted, and moreover the evidence which was adduced in support of an alleged intention to live permanently in Connecticut was of the weakest sort of character. Two of the persons testifying were cousins, who may have had some interest in the estates of one or the other of the original defendants.

The trial court also seems to have been influenced by the fact that the tax lists of the town and city of Danbury showed poll taxes against the plaintiff. As to the town tax

lists the evidence disclosed that the amount of the poll tax was not filled out and therefore such tax was not paid to the town. Whether a poll tax was paid to the city or not is a matter of conjecture, except in so far as the tax appears to have been listed upon two tax lists. Assuming, for the sake of argument, that the poll tax had been paid to the city of Danbury, the attention of the Supreme Court is respectfully called to the rule that the law as to payment of poll taxes is not restricted to such inhabitants as are citizens of the State, unless expressly so limited by the statute, but applies to resident aliens as well. See the following cases:

Opinion of the Justices, 7 Mass., 523.
Kuntz *vs.* Davidson County, 6 Lea (Tenn.), 65.
State *vs.* Ross, 23 N. J. Law, 517.
On Yuen Hai Co. *vs.* Ross, 14 Fed., 338; 37 Cyc., 811.

The Connecticut statutes do not even pretend to limit the imposition of a poll tax to inhabitants or residents of the State, the language in one case being "all male persons" and in the other case "the polls." (See statutes quoted above in last part of statement of facts.) Little, if any effect, therefore, should be given in the case at bar to the payment of the poll taxes in question.

Reliance will probably be placed by defendant in error upon the cases of Jones *vs.* Subera, 150 F., 462, and Reckling *vs.* McKinstry, 185 F., 842. In the former case the only evidence of intent to retain a former residence was plaintiff's own evidence as to his intention, which was absolutely contradicted by very significant acts, among them the describing of himself in a deed as of the State of the alleged new citizenship. There was no testimony of any person as to declarations made by him before the action was brought as is the case in the case at bar. His only utterance indicative of intention was made upon the witness stand, when it was advantageous to him so to do.

The Reckling *vs.* McKinstry case was a petition for removal from State to Federal court and involved the question of residency and not of citizenship. Not only had there been no declarations made of intention to retain the old residence, but, on the contrary, there had been a declaration of intention to make the home in the State of the new domicile. The plaintiff had purchased a photographer's business in the State of his new domicile, leased a shop for three years, bought a home where he resided, joined the chamber of commerce, whose main object was the developing of the town where it was located, and had paid a poll tax *which was only exacted of residents.* The plaintiff, however, testified that he intended to retain his old domicile. The court held the facts were too indicative of intent to acquire a new domicile to permit of his testimony being credited as to his intention to retain the old domicile, when such testimony was given after suit was brought.

These cases are thus easily distinguishable from the case at bar, and cannot therefore be considered as in any way controlling the decision of the case at bar.

We respectfully submit that the evidence adduced was not such as to reasonably convey a legal certainty as to an intention on the part of the plaintiff to reside in Connecticut.

POINT III.

(Assignment of Error 20-23.)

The laches of the defendants in failing to raise the question of lack of diversity of citizenship with knowledge thereof until after a period of three years had elapsed from the accrual of the cause of action, and for over two years after the filing of the substituted complaint, required the trial court, in the exercise of a proper discretion, to refuse at that late period to consider such question of alleged lack of jurisdiction.

It affirmatively appears in the record that the defendant Emma S. David, administratrix, had a conversation with the plaintiff in 1901 as to where he intended to make his home (Rec., f. 75). In fact she offered herself as a witness, but the trial court having already made up his mind to dismiss the case, sustained an objection to her testimony upon a ground which he himself stated he believed to be unsound (Rec., f. 75).

It also appears from the record that Jessie E. Selleck, wife of one of the executors of Benjamin Selleck, testified after the plaintiff's death that she had had a conversation with the plaintiff in 1900, when he came to Connecticut shortly after his uncle Jarvis' death, concerning his intention to make his home in Connecticut (Rec., f. 73). And the tax lists being public records and the church call presumably being accessible to anyone on inquiry, it is only fair to hold that the records were within the constructive, if not actual, knowledge of the defendants.

Knowledge on the part of defendant of the exact question which was subsequently raised is thus shown to have been had at the time the suit was brought and there was no attempt made to show that this knowledge could not have been used before. It is true that counsel for defendants as-

serted that he had no knowledge of the lack of diversity of citizenship until after the taking of the plaintiff's deposition (Rec., f. 78). But the fact remains that one of their clients had the knowledge and it became her duty to convey that information to her counsel, and counsel by questioning her about the matter could have easily ascertained about it. To permit a defendant with knowledge of a matter which would divest the court of jurisdiction to thus stand by until the period of limitation for an action in the State court had run before raising the question would seem to be about as unfair a proposition as could well be imagined and would seem to be a case, if ever there was one, for the application of the doctrine of laches.

This is not a case where the plaintiff was attempting to perpetrate a fraud upon the court. The plaintiff brought his action in good faith and refrained from voting in Connecticut, believing that the leaving of his desk in Michigan and of his intention to return there to the place where his wife's family and friends lived, and where he had many pleasant associates and had been in business for a number of years, gave him the absolute right to bring his action in the Federal court. He gained nothing by so doing. His redress could have been afforded him just as well in the State court as in a Federal court.

The situation therefore is one where a party has made an honest mistake and the other party, with knowledge of that fact, stands silent for a period of over three years before raising the question and carefully waits until the period of limitation has gone by so that the plaintiff would be deprived of his remedy upon a just cause of action.

That plaintiff was harmed by the delay in failing to assert the jurisdictional question is evident, for had the question been raised at the time it should have been raised and the trial court had held that it was without jurisdiction plaintiff could have forthwith begun an action in Connecticut and obtained the redress for which he brought his suit. The doctrine of laches is too well established to merit the citation

of cases on any of the points above pointed out, and we will therefore content ourselves with the citation of a few authorities in which it has been held that the doctrine of laches may and should be invoked even in case of alleged lack of jurisdiction of a Federal court owing to lack of diversity of citizenship.

The following cases recognize this doctrine:

In Briggs *vs.* Trader's Co., 145 F., 254, syllabi 1, 2, and 5 read:

> "Under sec. 5 of the Federal judiciary act of March 3, 1875, c. 137, 18 Stat., 472 (U. S. Comp. St., 1901, p. 511), which requires a circuit court to dismiss or remand a suit if it shall appear at any time that the court is without jurisdiction or that the parties have been improperly or collusively made or joined, it is immaterial in what manner or by what pleading the question is raised.
>
> "If the want of jurisdiction of a circuit court appears from the face of the bill, it is the duty of the court as soon as its attention is called to the fact or it is discovered, no matter how far the cause has progressed to place the parties as nearly as possible *in statu quo* and to dismiss the suit; but *if the want of jurisdiction does not appear on the face of the bill* or from the record, *but the objection is based on alleged extrinsic facts, it is the duty of the court to exercise its discretion in determining whether or not in the then condition of the cause* and in view of the relations existing between the parties by reason of the proceedings already taken therein, *it will permit such issues of fact to be raised.*
>
> "Where a stockholder's suit for dissolution of a corporation, brought in a Federal court, and of which such court had jurisdiction on the face of the record, *had proceeded for 16 months*, during which time a receiver had been appointed who had collected the assets of the corporation and made an advantageous sale of its property, and the claims of creditors had been proved, a non-participating creditor which in the meantime with the knowledge of the suit proceeded in a State court and obtained a judgment against a corporation *will not be permitted to inter-*

vene after such lapse of time to raise an issue of fact upon the question of jurisdiction in respect to which it does not claim to have any more knowledge or information than it had when the suit was commenced." (Italics ours.)

At page 257 it is said:

"In considering this question of jurisdiction, however, in my view, we must do so from two standpoints and with different rules governing in each case such consideration: 1st, if the want of jurisdiction appears from the face of the bill, then I have no hesitancy in saying that no matter how far the cause has progressed or how difficult it may be to retrace the steps taken it is the duty of the courts, nevertheless, to retrace those steps, place the parties as far as possible *in statu quo*, and then dismiss the proceedings, so soon as its attention is called to or it discovers such lack of jurisdiction; 2nd, *if the want of jurisdiction does not appear on the face of the bill*, and is not disclosed in the pleadings of proof, *but is solely based upon the alleged facts existent, if at all, outside the record, then it is the duty of the court, I conceive, to exercise a wise discretion in determining whether or not, in the then condition of the case and the relations existing between the parties by reason of proceedings already taken therein, it will permit such issues of fact to be raised.*" (Italics ours.)

Again at page 259 the following appears:

"Holding, therefore, that this bill on its face shows no lack of jurisdiction, and can be maintained, the next question to be considered is whether I shall permit this petitioner, the Monongahela Valley Bank, to come in at this stage of the proceeding and raise the issue of fact whether the plaintiff Briggs, is the *bona fide* holder of the fifty shares of stock claimed by him, or whether he is by collusion a mere nominal holder or assignee thereof for the purpose solely of giving jurisdiction to this court. As I have indicated heretofore, this involves an exercise of wise discretion on the part of the court to be governed by the circum-

stances of each case that may arise. *The court should promptly condemn by the penalty of dismissal any fraud committed upon its jurisdiction when such fraud appears. Yet, I conceive, it is not to presume that such fraud has been committed nor should it delay the prompt and effective determination of the party's rights in order to make investigation of unsupported suggestions that such fraud has been committed notwithstanding the contrary has been in effect alleged by the plaintiff in the bill.* Prior to the act of 1875, it is to be remembered that a person desiring to raise this question of jurisdiction in the Federal court had to do so within the time and with all the technical accuracy required by an appeal in abatement under common-law pleading. If he did not he was presumed to have waived objection to jurisdiction. *This act was not designed to modify 'the general scope of this rule' so far as the litigants were concerned*, but to confer upon the court the independent power to dismiss when fraud upon its jurisdiction was apparent, notwithstanding no such plea in abatement had been by any of the parties filed, as held in Hartog *vs.* Memory and Williams *vs.* Nottawa, *supra*.

"The statute, certainly did not purpose that any suggestion of said fraud on the court's jurisdiction should delay the parties in interest to such an extent as to jeopardize or destroy the rights of numerous innocent parties which may have become ascertained and fixed by the proceedings in the cause, *while the party seeking to be benefited by the disclosure stands and permits the proceeding to go on admitting that he had knowledge all the while of the fraud, yet keeping absolutely silent all the time about it.* The confusion, uncertainty, and delay, not to speak of the wrongs and hardships that would spring from encouraging such laches, are at once apparent. *In this case this petitioner practically admits itself to have had knowledge of the existence of this suit, which, as it charges, stands in the way of the collection of its judgment, for nearly sixteen months since such judgment was obtained, before it filed or attempted to file this petition.* Nor does it allege that during all that time it did not convey the same knowledge of this

alleged fraud upon this court's jurisdiction that it had when it filed such petition. *During that time the case here has gone on*, the affairs of the corporation have been to a degree ascertained, revenues have been derived from the rental of its property, such property has been sold most advantageously, creditors have proved their claims, and innocent purchaser's rights have attached. *Under these circumstances, I think, the laches of the petitioner are too clear and apparent to allow me to entertain at this late date in the proceedings its prayer to go back and permit an issue of fact to be raised upon the question of jurisdiction.*" (Italics ours.)

The same principle is recognized in *In re* Cleland, 218 U. S., at p. 272, where it is said, in speaking of an allegation that a suit did not involve a controversy within its jurisdiction:

"After continuing this activity for years, the petitioner now, *without adequately explaining his delay* and change of attitude, seeks to reduce all the proceedings to naught."

Again in Deputron *vs.* Young, 134 U. S., at p. 251, it is said:

"The application here was made more than a year and a half after the second trial, and, although the petitioner avers that he 'did not have knowledge of the above facts before the trial of this cause,' *we remark in passing that such an objection ought to be raised at the first opportunity, and delay in its presentation should be considered in examining into the grounds upon which it is alleged to rest.*"

Also in Hartog *vs.* Memory, 116 U. S., at p. 592, it is said:

"Here the citizenship of both the plaintiff and the defendant, *as it was in good faith understood by the plaintiff to be, was stated in the declaration*, and it was such as, if truly stated, gave the court jurisdiction. The defendant pleaded to the merits. He

alone knew of the mistake as to his citizenship, and *purposely omitted to make it known at the time. Under the issues joined the question of citizenship did not and could not arise.* If a judgment had been rendered on the verdict, Memory would have been bound by it, notwithstanding both he and Hartog were aliens. The record would have estopped him from denying the jurisdiction of the court. *The testimony about his citizenship was irrelevant and wholly immaterial. It did not in any manner relate to the merits of the case.*" (Italics ours.)

In Toledo Traction Co. *vs.* Cameron, 137 F., at p. 55, it is said:

"The court was acting under the authority of the act of 1875, and *it is settled that it must clearly appear that the court is being imposed upon, in order to justify a dismissal* of the cause; and *we may add that this rule is applied with increased rigor when the presentation of the objection is long delayed.*" (Italics ours.)

POINT IV.

(Assignments 10-19, inclusive, 21-25.)

Analysis of the evidence showing that the court in its deductions from the evidence applied a wrong principle and failed to apply a correct principle and made other and minor mistakes.

Conceding for the sake of argument only that there was a properly framed issue in the pleadings on the diversity of citizenship, also that the court had not elected to allow the issue of diverse citizenship to stand to the jury, and further that the court, after the jury had been impaneled and the pleadings read to the jury (including such one as existed on diverse citizenship), the court was authorized to try and determine the question of jurisdiction under the statute, instead of submitting it to the jury, it is the claim of the

plaintiff in error that the court erred because (*a*) in weighing and considering the evidence the court compelled the plaintiff, instead of the defendants, to assume the burden of proof, and (*b*) failed to consider and give due weight that the intentional withholding by the defendants of nearly all of their evidence, indicating an intent on the plaintiff's part to abandon his Michigan citizenship, until after the plaintiff's death, and neglecting to inquire of the plaintiff, on cross-examination, concerning said alleged fact, at the time his deposition was taken, justified the court in rejecting said evidence, because of the probability that the plaintiff could have explained the same, if his attention had been called to it at the time of the taking of his deposition, or that defendants' evidence ought not to be considered at its face value, and (*c*) minor points hereinafter referred to.

That the court placed the burden of proof upon the plaintiff instead of the defendants, we refer to this brief, page 15, Point I, referring to record folio 28, where it appears that the plaintiff, instead of the defendants, started first to introduce his evidence. We also refer to folio 64, where, at the close of the plaintiff's evidence, the court states to the defendants' counsel:

> "The COURT: You expect to rest your case on the testimony that has been submitted, as I understand it?"

Although the defendants' counsel states this is not so, the statement of the court clearly indicates that the court believed in his own mind that the burden of proof was upon the plaintiff.

We will now proceed to show that the court in considering the evidence acted upon the false impression or belief that the defendants had not withheld any part of their testimony until after the plaintiff had deceased, and that the conclusion based upon that false impression was harmful error. In order to present this question properly, a somewhat extended statement of the evidence is necessary.

The evidence establishing the Michigan citizenship prior to the plaintiff's removal to Connecticut in 1901 was overwhelming. In fact it is not controverted.

The evidence is strong that the plaintiff intended to return to Michigan as soon as the temporary events which brought him to Connecticut had occurred, to wit, (*a*) disposal of his scattered real estate, and (*b*) the completion of the Head litigation.

We have heretofore on this brief adverted to his leaving a desk in Michigan in 1901 for the express purpose of retaining his citizenship in that State, and his declarations accompanying the act to three reputable citizens of Michigan before he started on his journey to Connecticut of his intention to retain his Michigan citizenship and to return to Michigan after the accomplishment of the temporary purposes for which he left Michigan, and to his own testimony and that of his wife, before and after 1901, and the testimony of Jennie Selleck (Rec., f. 64), the widow of one of the deceased defendants, that his sojourning in Connecticut was only for temporary purposes, also that he refrained from voting in Connecticut and retained his membership in his Michigan fraternal order, these two latter facts being strongly consistent with the retention of his Michigan citizenship.

A closer inspection of the evidence shows that the temporary objects of his residence in Connecticut fit in and accord with the plaintiff's retention of the Michigan citizenship.

His real estate in Connecticut was improved property, but scattered. He inherited from his Uncle Jarvis in Danbury some (building) lots, one house on Pleasant street, another on Park avenue, and a third, a double house, on New street; also a farm with a dwelling-house on it in Ridgefield (R., ff. 36-38). This property was placed in the hands of different dealers for sale, including the house which he occupied (Rec., f. 51).

He had actually sold two out of the three lots (meaning building lots) (Rec., f. 36).

Head litigation: This was begun in August, 1900, and was pending when the plaintiff came to Connecticut in 1901.

It cannot be claimed that the plaintiff in 1901 knew how or when that suit would terminate. It did terminate adversely to the plaintiff, and on August 2, 1904, he paid the Head obligation, and on November 2, 1904, brought the present action for indemnity, which is really a continuation of the Head litigation.

If the plaintiff retained his Michigan citizenship until August 2, 1904, there certainly was no evidence that he lost it between that time and November 2, 1904, when he brought the present action (which in 1901 he did not know he would have to bring), and which, we repeat, is really a continuation of the Head litigation.

This examination of the evidence shows that the temporary objects of the plaintiff's removal to Connecticut in 1901 had not been accomplished when he brought this action in 1904, and during all of this period of time he refrained from exercising his electoral franchise, which he could have exercised at least one year after 1901 (Amendment to Constitution of Connecticut, article 8). And in fact his conduct subsequent to the bringing of the suit is consistent with the Michigan citizenship, for he refrained from voting in Connecticut all of the while after the action was brought and down to the time of his death.

Opposing Evidence Not Called to the Attention of the Plaintiff When His Deposition Was Taken, But Presented After His Death.

The defendants offered in evidence, as indicating an intention by the plaintiff to renounce his Michigan citizenship, the tax lists, letter from the Presbyterian Church in Michigan to the Congregational Church in Danbury, the alleged signing of a church call, and alleged declarations of plaintiff

to four witnesses, none of which evidence was called to the plaintiff's attention when his deposition was taken, but was offered at the trial after plaintiff's death.

It is the claim of the plaintiff that this withholding of the evidence until after the plaintiff's death was a factor which the court should have considered in weighing the evidence, and which he did not do, because he believed that the defendants first knew of this evidence after the taking of the plaintiff's deposition.

We are prepared to show that the defendants (although evidently not communicating it to their trial counsel) were aware of substantially all of the evidence which they withheld from the plaintiff on cross-examination when his deposition was taken and introduced at the trial after his death. We are also prepared to show that the court action was based on the mistaken belief that the defendants had not so withheld their evidence, and therefore the court's conclusion on the evidence is erroneous.

We are not here concerned with the rule of law which in some jurisdictions absolutely excludes alleged declarations made out of court by a witness, which have not been called to his attention on cross-examination. 2 Wigm. on Ev., sec. 1028; Brown *vs.* Gillett, 33 Wash., 264; 74 Pac. Rep., 386-389. Nor with the rule which obtains in other jurisdictions (including Connecticut), which makes the admissibility of such alleged statements made out of court to depend upon the discretion of the court. Hedge *vs.* Clapp, 22 Conn., 262; Adams *vs.* Herald Publishing Co., 82 Conn., 448. For such rules relate to witnesses who are alive at the time of the trial, and for the further reason that in the case at bar this kind of evidence (and it was the only kind and all the evidence that the defendant offered) was not objected to when offered except the tax list and testimony of one witness. But at the conclusion of the evidence when the court announced that it would dismiss the action, the plaintiff's counsel protested against such evidence as had

not been called to the plaintiff's attention on cross-examination (Rec., ff. 78-79).

The record shows that the counsel for the plaintiff believed that the remarks of the court, that nothing should go to the jury until the court had first passed upon the question and which "remarks" were made while the jury were sitting in the jury box listening to the evidence and after all the pleadings had been read to them, were the usual remarks of a trial court who has the right to non-suit or dismiss a case and not the remarks of a judge during a bench trial.

At the conclusion of the evidence counsel for the plaintiff says:

> "Mr. PIERCE: Allow us to get upon the record in some way our claim, that this is a litigated matter, testimony on both sides, issue of pleadings on both sides; and we are entitled to go to the jury" (Rec., f. 76; *vide* also Rec., f. 66).

Had the plaintiff's counsel understood otherwise they could have asked the court to exclude all of the defendants' evidence, because none of it was called to the attention of the plaintiff on cross-examination.

And if we concede to the defendants the most favorable rule of law applicable, that is, that the exclusion of the evidence is a matter of legal discretion and the court would have been justified upon the facts now apparent upon the records to have excluded the evidence or could have called for further evidence upon the question of the defendants' knowledge or laches in not knowing of their alleged evidence before the plaintiff's deposition was taken.

2 Wigmore, sec. 1030.

Hedge *vs.* Clapp., *supra*, at page 270.

By this action of the court in assuming that the defendants had no knowledge prior to the taking of the plaintiff's deposition of their evidence, the plaintiff was deprived of

the right to have the court exercise its discretion in excluding or admitting ~~said evidence or~~ parts thereof.

This false assumption existed in the mind of the court when he was listening to the defendants' evidence and he carried it down to judgment. It was certainly too late then to remove the impression created while the court was receiving the evidence and which had crystallized into a conclusion of fact.

The plaintiff had the right, under the belief that the issue stood to the jury, when this evidence was offered, not to run the risk of prejudicing his case to the jury by objecting to it, and relying on the belief that by argument he could do away with its effect, but when the court immediately after the conclusion of the evidence decided the case under the statute, although the first paragraph in the complaint, relating to diversity of citizenship, had been read to the jury, and the jury which had been impaneled had from the jury box listened to all of the evidence), the counsel for the plaintiff did raise the question as to this evidence (Rec., f. ~~70~~ 71). We are therefore concerned, not with the admissibility of the evidence in the first instance, at this time, although it was the conduct of the court, in not making plain its position to the counsel for the plaintiff, which allowed it to get to the jury, but we are here concerned with the duty of the trial court in weighing the defendants' evidence, which imputed certain statements and acts to the plaintiff, and which he had no opportunity to explain, qualify or deny, and which was introduced after his death, and most of which the defendants were aware of when his deposition was taken.

The record shows that the court believed and stated that the first knowledge that the defendants had of the evidence affecting the jurisdiction, which they had introduced, was obtained at the taking of the plaintiff's deposition.

> "The Court: That was the first time that anything appeared except the pleadings upon which the

defendants could base any action at all. But there is no objection to your raising all kinds of questions" (Rec., f. 78).

The court had previously announced, immediately on the conclusion of the defendants' evidence, that he would dismiss the case and did not care to hear any argument (Rec., f. 76), and the above-quoted statement by the court was during the colloquy between court and counsel after the decision, and while the plaintiff's counsel was stating their exceptions to the court's ruling. How the court obtained this impression when the defendants were introducing their evidence it is difficult to state. Certainly the record supports no such conclusion.

A critical examination of the testimony of the plaintiff, commencing at folio 28 and concluding at folio 40, fails to disclose any of the subjects upon which the defendants afterwards introduced their evidence, unless it be the statement that the plaintiff owned real estate in Danbury (which, of course, was known personally to the defendants), and which was incidental to the plaintiff's testimony that he moved to Connecticut to dispose of said scattered real estate, and to finish up the Head litigation. Neither will an examination of all of the plaintiff's evidence, commencing at folio 28 and ending at folio 64, or of all of the defendants' evidence, commencing at folio 64 and ending at folio 76, disclose anything which would justify the court's belief that it was after the plaintiff's deposition was taken that the defendants first knew of the evidence which they introduced after his death.

Certainly it cannot be said that the testimony of Jessie E. Selleck, wife of one of the executors of Benjamin Selleck (Rec., f. 73), to an alleged conversation with the plaintiff, in the year 1900, nor the testimony of Emma S. David, the executrix of another defendant, in her answer to a question in the first part of her testimony (Rec., f. 75), that she had a conversation with the plaintiff "shortly after Jarvis Sel-

leck's death (1900), concerning his home," was not known until after 1911, when the plaintiff's deposition was taken.

Nor can it be said that she and the other defendants did not know the plaintiff was paying taxes on Danbury real estate, for Mrs. David was a cousin of the plaintiff. Her father, Darius Selleck, being joint heir with the plaintiff of the estate of Uncle Jarvis Selleck, and she lived in Danbury when the plaintiff was temporarily sojourning there and must have known every piece of property which he inherited from Jarvis Selleck's estate (Rec., ff. 75-79). The church records likewise were accessible to her and the other defendants.

Plaintiff could have explained or qualified all of the evidence upon which he was not cross-examined and which was offered in evidence after his death and perhaps have denied some of it.

The testimony of Jessie E. Selleck (Rec., f. 73), wife of one of the executors to the alleged conversation in 1900 with the plaintiff, and the testimony of the defendant executrix Emma David, made at the same time (1900), and the testimony of Henry Starr, are in direct conflict with the testimony of Jennie E. Selleck, widow of the deceased defendant Benjamin Selleck, that she had a talk with the plaintiff at the same time, and which conversation was that the plaintiff would retain his Michigan citizenship.

Had the plaintiff been inquired of on his cross-examination concerning these alleged conversations a denial by him would have been in corroboration of the testimony of Jennie E. Selleck, the then wife of one of the defendants. If, on the other hand, the plaintiff had admitted the conversation attributed to him, he could readily have explained the same by the attitude of his wife, after his return to Michigan in 1900 (which was after the alleged conversations imputed to him), that she did not want to go to Connecticut and his express promise to her that they would be in Danbury only long enough to dispose of his scattered real estate and to

finish the Head litigation, which it was expected would not take over three years.

(Rec., ff. 31, 38, 46-51.)

The testimony of N. Selleck that the plaintiff assured him that he would be made a voter is met by the testimony of Town Clerk Stebbins that the records from 1820 to the date of the trial show that the plaintiff was never an elector (Rec., f. 62).

As to the church attendance:

The plaintiff's explanation could have been the same as his wife's—that they took letters from the Presbyterian Church in Michigan to the Congregational Church in Danbury, at the request of his aged mother, after the plaintiff had stated "we won't be here long" (meaning in Danbury) (Rec., f. 55).

As to the signing of the church call:

There is no direct evidence that the plaintiff signed this call (Rec., f. 56, near end), but if he did, it is explainable by the fact that he joined the church for membership during his temporary residence in Danbury at his mother's request.

The payment of a small tax on $75 worth of personal property was explainable on the ground of convenience. Certainly the plaintiff had the right, as a citizen of Michigan, to waive his payment of taxes on personal property in Michigan and pay them in Connecticut instead of going to the trouble of paying the small amount in Michigan.

As to the poll tax, under the charter of the city of Danbury, he was obliged to pay that in any event.

This analysis of the evidence shows (*a*) that nearly all of the evidence offered by the defendants and withheld until after the plaintiff's death was within their knowledge. Certainly over half of the alleged statements imputed to the plaintiff werewithin their knowledge,and the tax lists,which were public records, and the church call, a quasi-public rec-

ord, were within their constructive, if not actual, knowledge; (*b*) that all of this evidence could have been successfully met by the plaintiff if it had been called to his attention; (*c*) that the court acted on the belief, which is unsupported by the record, that the defendants had not either purposely withheld evidence or were guilty of laches in not apprising themselves of the existence of such evidence at the time the plaintiff's deposition was taken.

Herein lies the error of the court in making his deductions from the evidence.

It is fair to assume that if the court had believed that the defendants had withheld their evidence or any part of it until after the plaintiff's death he would have held that such conduct could have been reconciled only on the theory that the defendants believed that, had the evidence been called to the plaintiff's attention when his deposition was taken, he could have explained the same consistent with the retention of his Michigan citizenship. The record shows that the court did not apply that rule, and hence there is manifest error in his conclusion.

Minor Mistakes.

It does not appear from a close reading of the record (folios 65-76, inc.) that the court knew of the insignificant amount of the personal property upon which the plaintiff paid his tax, for it nowhere appears that said tax lists were read fully, but it does appear (Rec., f. 64) that the court's attention was called to the fact that he was paying "taxes on personal property" in the town and city of Danbury, and also poll taxes (f. 65), but the insignificant amount of said taxes on $75 worth of personal property was not stated.

If the court had given some opportunity for argument, the insignificant amount of the tax could have been pointed out to the court as consistent with an intention to retain his Michigan citizenship, and the charter of the city of Danbury would have been called to the court's attention, which

required poll taxes from males who were not electors, but this right was cut off by the declaration of the court to the defendants' counsel that he did not care for any argument.

The inspection of the record shows that the court applied a wrong principle of law to the evidence; (*a*) that the burden of proof was upon the plaintiff, and (*b*) under a false impression that the record failed to show any intentional or negligent withholding of the defendants' evidence until after the plaintiff's death, the court failed to apply the correct principle which such withholding of evidence required the court to apply and which the record shows existed.

POINT V.

It is respectfully submitted that the action of the trial court in dismissing the suit for the want of jurisdiction be reversed and that the trial court be directed to entertain jurisdiction and to hear the case upon its merits or such other relief as the plaintiff in error is entitled to.

Respectfully submitted,

H. W. TAYLOR,
Counsel for the Plaintiff in Error.

The Supreme Court of the United States

OCTOBER TERM, 1914.

NUMBER 97.

HENRY A. GILBERT, ADMINISTRATOR OF THE ESTATE OF ISAAC H. SELLECK, DECEASED, PLAINTIFF IN ERROR

vs.

EMMA S. DAVID, ADMINISTRATRIX OF THE ESTATE OF DARIUS SELLECK, AND BENJAMIN S. SELLECK AND ROBERT SELLECK, EXECUTORS OF THE WILL OF BENJAMIN SELLECK, DECEASED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

BRIEF FOR THE DEFENDANTS IN ERROR.
(Defendants below)

A. T. BATES,
BRISTOL & WHITE,
Attorneys for Defendants in Error.

A. T. BATES,
FREDERICK H. WIGGIN,
Of Counsel.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

BRIEF FOR THE DEFENDANTS IN ERROR.
(Defendants below)

STATEMENT.

This action was begun on the 5th day of November, 1904, in the Circuit Court of the United States, the jurisdiction of the Court being invoked solely upon the ground of diversity of citizenship. The complaint alleged that the plaintiff was at the

time of the institution of the suit a citizen of Michigan, and the defendants are admittedly citizens of Connecticut.

A substituted complaint was filed on May 24th, 1905.

The defendants answered on August 3d, 1907, and by their answer specifically denied knowledge or information of the citizenship of the plaintiff and left him to proof thereof (Record p. 8).

Under the law of Connecticut this has the effect of a denial.

Sayles vs. Fitzgerald, 72 Conn., 391, 396.

A reply was filed by the plaintiff on May 2d, 1911 (Record p. 10).

The plaintiff's deposition had been taken in April, 1911, shortly before his death (Record pp. 15 and 16), and the question of his residence or domicile was then made the subject of examination and cross-examination. The defendants contended at the trial that upon certain facts it must be held as a matter of law that at and before the institution of this action, the plaintiff was a citizen of the State of Connecticut, residing in Danbury, and that therefore this action should be dismissed.

Motions to dismiss the suit for want of jurisdiction were filed on April 27th, 1911, and October 5th, 1911, by the defendants (Record pp. 12, 13, 56 and 57).

On March 4th, 1912, a jury was sworn and impanelled to try the case, and the Judge at the close of the evidence on the subject of jurisdiction, took the case from the jury, refused to hear arguments, and himself dismissed the case for want of jurisdiction (p. 11 and pp. 49-55 of Record).

A formal judgment dismissing the case upon the sole ground of want of jurisdiction, on account of lack of diverse

citizenship, was entered on October 24th, 1912, as and for August 26th, 1912, *nunc pro tunc* (Record pp. 12 and 13).

On October 19th, 1912 (pp. 59 and 60 of Record), the Judge certified that the cause was dismissed solely because of want of diversity of citizenship and of lack of jurisdiction.

FACTS.

Most of the facts relied upon were either testified to by the plaintiff upon direct or cross-examination, or are so well established by record evidence as to be beyond dispute.

The plaintiff himself testified (Record pp. 16 and following) that prior to 1900 he had for many years lived in Menominee, Mich. In that year, his uncle, Jarvis Selleck of Danbury, died, and left him a considerable amount of Connecticut real estate. On hearing the news, he "got on the cars the same day and came right on," and remained in Danbury from some time in March, 1900, until some time in the early part of 1901, when he returned to Menominee for a little while, and in February, 1901, came back to Danbury, "to look after Uncle Jarvis' property that he had left me."

Before that time, the plaintiff had been living in Michigan with his wife and mother, who constituted his entire immediate family, and some time in 1901, the wife, who had remained behind, sold the Michigan home, by direction of the plaintiff, broke up housekeeping, and came East with the mother, and the family moved into one of the houses which the plaintiff had inherited from his uncle. From that time, from the summer of 1901 up to the date when the deposition was taken in April, 1911, the plaintiff, his mother and his wife, had resided continuously in the same house, at No. 33 Pleasant Street, Danbury, Conn.

All of the household furniture formerly in the Michigan home was either sold or brought East to Danbury, with the exception of one desk. (See also testimony of plaintiff's widow, p. 34.) This desk, which was left with a brother-in-law, constituted the only property in Michigan which the plaintiff owned after he left there.

He owned the house that he lived in at Danbury, a farm in Ridgefield, also another double dwelling house on New Street in Danbury, and some building lots.

The plaintiff never returned to Michigan after he left there in 1901. Shortly after the family came to Danbury they joined the church there (p. 35, p. 43), bringing with them for that purpose a letter from their former church in Michigan, and on March 25th, 1911, plaintiff signed a notice, calling a meeting of the church (p. 44).

In 1903 and 1904 the plaintiff paid a poll tax in the city of Danbury, and in 1903 and 1904 paid taxes on personal property, as well as on his Danbury real estate. Plaintiff also paid personal taxes to the town of Danbury, in 1902, 1903 and 1904. These tax lists all appear to have been signed and sworn to by the plaintiff (Record, following p. 58).

In all of the six separate tax lists above referred to, the plaintiff describes himself as "residing on 33 Pleasant Street."

Plaintiff stated to witness Starr (p. 45) that he was going to make Danbury his home. See also his statement to witness Jessie E. Selleck (p. 47).

Plaintiff told witness Nathaniel Selleck in 1903 or 1904 (p. 46) that he intended to be made a voter in Danbury; "he assured me that he would the next morning."

I.

CITIZENSHIP.

THE PLAINTIFF WAS DOMICILED IN, AND A CITIZEN OF, CONNECTICUT WHEN THE ACTION WAS BROUGHT, AND WAS NOT A CITIZEN OF MICHIGAN.

(Assignments of Error, Numbers 10, 11, 12, 13, 14, 15, 23 and 24, pp. 63 and 64 of the Record.)

The facts stated establish conclusively that the plaintiff, prior to the institution of this action, was a citizen and resident of the State of Connecticut. The breaking up of the Michigan home, and the establishing of a new home in Danbury, would of itself be conclusive, so would voluntary payment of personal and poll tax.

The claim is made, of course, on behalf of the plaintiff, that in order to acquire a new domicile of choice, there must not only be residence but "intention" to reside for an indefinite time; the plaintiff's claim, as he testifies to it, is substantially that when he came here, he did not mean to stay more than three years, but has been detained by these litigations, and also by the fact that he has been unable to dispose of his Connecticut real estate, at satisfactory prices, and he testified in his deposition (p. 21), in 1911, that he still expected to return to Michigan "As soon as I dispose of this property in Danbury, I calculate to go back." . . . "I expect to build a house there," and on redirect examination (p. 24):

> "Q. You want to dispose of this property? A. Yes. Q. Please state whether at the time you came here a large part of your holdings in Connecticut was real estate? A. Yes, sir. Q. Please state whether or no the value of real estate at that time was low? A. It was very low. Q. Did you hold it

> for the purpose of a rise? A. Yes, sir. After I become acquainted with the values of property, I kept it."

It is submitted that this state of mind which the plaintiff testifies to is entirely consistent with his domicile in Connecticut.

> "Domicile has been thus defined: 'A residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time.' This definition is approved by Phillmore in his work on the subject. By the term 'domicile' in its ordinary acceptation is meant, the place where a person lives and has his home. The place where a person lives is taken to be his domicile until facts adduced establish the contrary."
>
> Mitchell vs. United States, 21 Wal., 352.

If the plaintiff was domiciled in Connecticut when this suit was begun, he was a citizen of that state within the meaning of the Constitution.

> Williamson vs. Osenton, 232 U. S., 619, 624.

There are, of course, a good many cases where a prolonged residence is not necessarily accompanied by an intention to make the domicile, especially if the residence is in a foreign country, or a distant colony, and in connection with some particular office or calling. But as between two states of the Union, the presumption that domicil follows the actual family home of the party, in the case of a complete breaking up of the old home and the establishment of a new one, is practically irresistible.

It is further submitted that if the plaintiff's testimony is taken at its face value upon the question of intent, it does not disclose anything which amounts to a present "intention" to go back to Michigan. The intention to return was, admittedly,

contingent upon the plaintiff obtaining a satisfactory price for his real estate. In the meantime, he was "holding it for a rise," and there is no evidence that it was offered for sale at any particular price. If the plaintiff was holding it on a stationary market, he would, by all the rules of human conduct, have been more than willing to hold it on a rising market. It is impossible to give any legal value to the plaintiff's statement that he intended to go back to Michigan, if and when, he sold his real estate at satisfactory prices. The contingency might never arise, and as the plaintiff could always accept or refuse any offer that might be made to him, it would be impossible for any court to say whether or not the contingency had arisen. It is difficult to imagine a more floating and uncertain intent. Measured against the abandonment of the Michigan home, it amounts to nothing. The same is true of his intent to await the outcome of certain litigations. This comes well within the rule of Williamson vs. Osenton, 232 U. S., 619, 625, holding that there is a change of domicile where a person intends to remain at the new abode, "for a time to which the plaintiff did not then contemplate an end."

It is not uncommon for litigants in federal courts to attempt to establish a domicile inconsistent with their conduct by declarations of a contrary intent, and if the court should hold that the evidence as to plaintiff's mental attitude prior to the institution of this suit, and after his removal to Connecticut, appeared to be inconsistent with his conduct in establishing a home here for himself and his family, and in joining the church, and paying a poll tax and personal taxes, we should then rely upon a line of authorities which have had occasion to deal with litigants, in federal causes, who have sought to invoke, or escape, the jurisdiction of the United States courts by testimony inconsistent with their actual conduct.

The rule and the reason for it cannot be stated better than in the language of Mr. Justice Washington in Butler vs. Farnsworth, reported Federal Cases, No. 2240:

> "The only rational construction of the constitution, in relation to federal jurisdiction, is to limit it to cases where the suit is between the resident citizens of different states, or where an alien is a party. No difficulty has ever existed, or could exist, where the suit is between the native or factitious citizens of one state, and those of another. But when a removal takes place from one state to another, the question necessarily arises, whether the person, so removing, is a citizen of the state in which he was born, or was naturalized, or of that to which he had removed? As to this matter, we can add nothing to what was said in the case of Cooper v. Galbreath (supra). The question of law, arising upon the particular facts of each case, must always be, has the person so removing, become incorporated into the new society, so as to be a member of it, in like manner as he was of the political family from which he emigrated? In other words, has he changed his domicile, and become a permanent resident in the state to which he has removed? Mere residence is prima facie evidence of such a change; although when it is explained, and shown to have been for mere temporary purposes, the presumption is repelled. It is true, that the intention of the party in changing the place of his residence, is a material ingredient in the question of citizenship, as it concerns federal jurisdiction. But this intention is to be collected from the acts, and not from the declarations of the party. If the removal be for the purpose of committing a fraud upon the law, and to enable the party to avail himself of the jurisdiction of the federal courts, and that fact be made out by his acts, the court must pronounce that his removal was not with a bona fide intention of changing his domicile, however frequent and public his declarations to the contrary may have been. If, on the other hand, the sincerity of the removal, for the purpose of perma-

nently residing in the state which the person has selected, be not questioned, and his acts correspond with such purpose, the change of domicile is completed, and the law forces upon him the character of a citizen of the state where he has chosen his domicile; although he may have uniformly declared, as it is contended the lessor of the plaintiff has done, that he nevertheless considered himself as continuing a citizen of South Carolina. It is a conclusion of law upon certain facts, which constitutes him a citizen of the state where he permanently resides; which neither his private intentions, nor his public declarations can alter. Were it otherwise, a door would be opened for the grossest frauds upon the jurisdiction of the federal courts; since a person in the predicament stated might qualify himself to sue, or disqualify himself from being sued in those courts, by declarations, known perhaps only to a few of his friends, though in manifest hostility to open and notorious acts, from which alone the world can judge of his intentions."

"On a change of domicile from one state to another citizenship may depend upon the intention of the individual. But this intention may be more satisfactorily shown by acts than declarations."

Shelton v. Tiffin, 6 How., 185.

"Upon the whole of this testimony I am forced to conclude that the acts of Mr. Davis have not corresponded with his announced intention of taking up his residence in Richmond, and becoming a citizen of Virginia." . . . "Actions are said to sometimes speak louder than words, and when they point to an apparent intention at variance with that announced, they are certainly entitled to great weight in determining the question of whether a real change of domicile has been effected."

Davis vs. Dixson, 184 F. R., 509.

Two cases which closely resemble this are Jones vs. Subera, 150 F. R., 462, and Reckling vs. McKinstry, 185 Fed. Rep.,

842. These were both cases where the plaintiff undertook to bring an action in the federal courts, on the theory that he still retained a former domicile in another state, and in both instances, the court dismissed the action on the ground that the plaintiff had acquired a new domicile despite his protestations to the contrary. In Jones vs. Subera, the plaintiff had formerly lived in Washington, but came to South Dakota on the death of his brother, and lived there on real estate which he owned for about two and one-half years. He had never voted in South Dakota, but had not voted in Washington after he left there. He was a single man, and had no family home, but he had described himself in a conveyance of land as of South Dakota, although he claimed that the declarations in this instrument were a mistake, and were never called to his attention. He also testified that he also claimed the state of Washington as his home, and still regarded it so, and alleged that he maintained his house in Washington throughout this entire time.

It will be seen that the case was very much stronger in favor of the plaintiff's declarations of an intention to retain his former domicile than the present one. The court said:

> "He says he has never intended to make South Dakota his home. Do his acts and declarations before the matter of citizenship became a subject of inquiry bear out such intention?" . . . I do not think, in face of the facts that appear by the affidavits filed, that complainant's testimony that he intends to return to the state of Washington permanently to reside can be allowed to decide the issue now before the court. It does not affirmatively appear to the court that complainant was a citizen of the state of Washington on the 8th day of August, 1906.
>
> The motion, therefore, of the counsel for defendants will be granted."

In Reckling vs. McKinstry, the defendant McKinstry, who was sued in South Carolina, attempted to remove the case to the federal court, on the ground that he still retained his former Connecticut citizenship, although for nearly two years he had actually lived in South Carolina. The proof was that he came to South Carolina and bought a photographer's business, took a lease for three years of the shop, bought a home where he had since resided, joined the Chamber of Commerce, and paid a poll tax. On the other hand, he said he had never determined to become a citizen of South Carolina, "but to the contrary, deponent and his mother, who lives with him, are seriously considering the advisability of moving back to his home in the town of Manchester, Conn."

The Court remanded the cause, saying:

> "Here we have a man coming into the state expressing the intention of making his home here. He purchases a business of a character which for its development requires a residence more or less prolonged. He takes a lease on the premises wherein the business is located for a three year term. He purchases a home, and has been continuously residing in it for more than a year. He joined the Chamber of Commerce, whose main object is the development of the town in which he lives, and pays the poll tax, which is only demanded of residents. By all the definitions, he must be considered a resident of Columbia."

In Pacific Mutual Life Insurance Co. vs. Tompkins, 101 Fed., 539 (C. C. A. 4th Circuit, 1900), the plaintiff

> "had been born in the State of West Virginia, and had lived at Huntington in that State. He removed to Clifton Forge, Va., and had changed his domicile. Was this change made *animo manendi?* By this term is not meant the hope and expectation which so many entertain who leave their homes for business

> purposes or to better their fortunes,—of some day returning to the place of their birth, and there to reap the reward of their efforts."

The Court then refers to facts that plaintiff had established a home in Virginia, paid taxes, and voted there, and described himself as belonging there.

> "There is a very strong presumption that in the case at bar the plaintiff had changed his domicile, and had become a citizen of the State of Virginia. He, no doubt, hoped and intended to return to his former home in West Virginia. But the consummation of that hope and intent depended upon circumstances beyond his control,—the happening of some fortunate event giving him opportunity of return."

It is not believed that any case can be found where the breaking up and sale of a former home and the removal of the party with his entire immediate family to another state, the establishment of a home in that other state, the ownership of considerable property interests in such state, and the payment of personal taxes and poll taxes there, has not been held, after the lapse of two or three years, to constitute a change of domicile.

PROOF TO A LEGAL CERTAINTY.

Apparently the plaintiff in error supposes, as we gather from Assignment of Error No. 24, p. 65, that the defendant has the burden of proof and must produce evidence of lack of jurisdiction which will convince the mind to a legal certainty.

Such cases as Barry vs. Edmunds, 116 U. S., 550, and Wetmore v. Rymer, 169 U. S., 115, are cited to sustain this proposition. However, in those cases, and indeed in the great majority of the cases in the higher and lower courts where this proposition is enunciated, the question of jurisdiction was not

dependent upon the question of citizenship, but upon the amount in controversy.

The reasoning of Judge Hook, in a dissenting opinion in Hill vs. Walker (C. C. A. 8th Circuit, 1909), 167 Fed., 241, 261, 265, is so clear that we venture to quote it in distinguishing these cases. He points out that the "legal certainty" theory ought to apply only to cases where the dispute is as to the jurisdictional amount. As he shows—where the value of the sum in controversy is alleged as being jurisdictional by plaintiff and "is disputed by defendant it furnishes proof of the existence of a controversy over the sum demanded. And there is obvious reason for saying that the claim of a plaintiff, not clearly fictitious on its face, but which may possibly have legal foundation, makes a case for jurisdiction until it is overthrown by proof to a legal certainty, for as long as there is any doubt or uncertainty a dispute naturally remains to be determined upon a trial of the merits. The very lack of legal certainty to the contrary shows the continued existence of controversy."

The whole doctrine is somewhat discredited and questioned in Chase vs. Wetzlar, 225 U. S., 79, 85, where this Court spoke thus:

> "We do not deem it necessary to now consider the conflict of opinion which has sometimes arisen concerning whether the doctrine of the cases relied upon and the fundamental conception upon which those cases rested entirely harmonizes with the provision of the Act of 1875, requiring a Federal Court of its own motion to dismiss a pending suit when it is found not to be really within its jurisdiction."

See also Wells Co. vs. Gastonia Co., 198 U. S., 177, 182, where the pleading was no knowledge or information, as it was in the answer in our case.

Other cases where the doctrine has been enunciated should be examined for their facts. In several of them there was not even a denial, or at most a general denial, of the allegation of citizenship, no evidence for the defendant on this subject was introduced, and the defendant either after judgment, or on appeal, sought to take advantage of some technical defect in plaintiff's proof. Such cases are clearly not in point.

Finally, it may be urged that stronger evidence of a change of domicile than is here presented, can hardly be found in any case where there is dispute about the matter. There can be no reasonable doubt that the plaintiff was a domiciled citizen and resident of Connecticut. The defendant has satisfied the most stringent rule of proof.

II.

ASSIGNMENTS OF ERROR TWENTY-SIXTH, TWENTY-SEVENTH, TWENTY-EIGHTH AND TWENTY-NINTH SHOULD NOT BE CONSIDERED, AS THEY HAVE NOT BEEN PROPERLY ASSIGNED.

These are the additional assignments, based upon the theory that the issues in the case do not support the judgment of dismissal.

Section 997 of the Revised Statutes requires assignments of errors to be annexed to a writ of error.

Rule 35 of this Court requires that in any writ of error, such as this, which is brought under §238 of the Act of March 3, 1911, ch. 231, direct to this Court from a District Court, no writ of error shall *be allowed* until such assignment of errors shall have been filed, and further that errors not assigned according to this rule will be disregarded, saving to the court an option to notice a plain error not assigned.

The above numbered assignments were not filed with the writ of error, nor printed in the record, for the last one there found is number twenty-fifth (p. 66).

They are contained in the brief at page 14, however, and the first time counsel for the defendant in error saw them was when the brief was served upon them, many months after the writ of error was allowed.

The reasons for such a rule as number thirty-five are stated by Sanborn, J., in Simpson vs. First National Bank, 129 Fed., 257, 258, as follows:

> "One is that the judge to whom the application for the allowance or issue of a writ of error is presented may be informed what the alleged errors are upon which the petitioner relies, so that he may intelligently decide the question whether or not the writ should be issued. The other is that opposing counsel and the Appellate Court may be informed by a statement which becomes a part of the record what questions of law are presented for their consideration and determination."

This Court has recently condemned the practice of assigning errors in briefs, in the cases of Briscoe vs. District of Columbia, 221 U. S., 547, 549, and Columbia Heights Co. vs. Rudolph, 217 U. S., 547. It is true that in those cases no assignments of error whatever appear to have been filed with the record, but the principle seems the same.

It was so held in Mast & Co. vs. Superior Drill Co., 154 Fed., 45, decided in the Sixth Circuit in 1907. There three additional assignments of error were filed in the trial court seven days after the appeal and original assignments of error had been filed. It was held, citing cases from various circuits, that such assignments form no part of the record.

> "That consists of the proceedings of the court below as they existed at the time the appeal was taken."

In the Ninth Circuit in Lloyd vs. Chapman, 93 Fed., 599, it was said:

> "It is plain, therefore, that such assignment constitutes an essential part of the record to be presented to this court, and that it cannot be superseded by a subsequent assignment of errors,—certainly not by one filed without leave of the court."

And in the Fourth Circuit, in Burchett vs. U. S., 194 Fed., 821, the Court declined to consider additional assignments of error certified from the Court below.

The assignments referred to in the present case are technical in character, and it, therefore, seems fair to meet them with a technical objection. We do not believe that alleged errors based upon theoretical distinctions as to forms of pleading ought to be noticed by the court as "plain errors not assigned."

III.

IT WAS NOT ERROR TO RENDER JUDGMENT DISMISSING THE CAUSE UPON THE PLEADINGS AS THEY STOOD.

(Assignments of error 26th-29th inclusive).

If the Court should notice these alleged errors in spite of the fact that they are improperly assigned, we are confident that they will be found wanting in merit.

As previously stated, the allegation of plaintiff's citizenship was, in effect, denied by the answer, and prior to the time of trial two motions to dismiss for want of jurisdiction had been filed. *The filing of these motions "to dismiss said suit for want of jurisdiction" is recited in the judgment* (pp. 12, 13), and the second motion is annexed to the bill of exceptions, being found at page 56.

The motion asks that the action be dismissed, alleging

> "that the plaintiff, Isaac H. Selleck, is, and at the beginning of said action was, a citizen of the State of Connecticut, residing at Danbury, in said State: and is not, and at the beginning of said action was not a citizen of Michigan, as alleged in said complaint."

This is certainly specific enough to found a judgment upon, and to give the plaintiff notice of defendant's claims.

The gist of plaintiff's complaint in point 1 of his brief, if we have been able to extract it, is that there was error in dismissing the action because no plea in abatement to the jurisdiction was filed, according to Connecticut common law practice. It is true as stated in Deputron vs. Young, 134 U. S., 241, 251, that

> "Prior to the passage of the act of 1875, such a question could only be raised by a plea in abatement in the nature of a plea to the jurisdiction."

The trouble with the plaintiff's argument is that he overlooks the meaning and force of that statute (36 Stat. L., Part I, p. 1098, ch. 3, §37), as construed and expounded by the Courts ever since its passage. Under the statute, which controls the state practice, *pro tanto*, no plea to the jurisdiction is required, but the defendant, or the trial court, or the Appellate Court may raise the objection at any time.

Great reliance seems to be placed upon the case of Hartog vs. Memory, 116 U. S., 588, which was a suit by a citizen of Holland against one alleged to be a citizen of Illinois. Plea—general issue and limitations. On trial to the merits defendant testified "incidentally without attracting the attention of the Court" that he was a citizen of Great Britain.

> "The defendant suffered it to pass without special notice until after the verdict against him. He then moved for a new trial, not, so far as the record discloses, because of any errors at the trial, but, as we must presume, for the purpose of laying the foundation to dismiss; and the case appears to have been dismissed by the court solely upon the defendant's motion and the irrelevant testimony given at the trial, and without affording the plaintiff an opportunity to rebut or control that testimony."

In one passage it is remarked in passing: "Neither party has the right, however, without pleading at the proper time and in the proper way, to introduce evidence, the only purpose of which is to make out a case for dismissal."

The meaning of this is controlled by a later quotation: "When the defendant has not so pleaded as to entitle him to object to the jurisdiction, and the objection is taken by the court of its own motion, justice requires that the plaintiff should have an opportunity to be heard upon the motion, and to meet it by appropriate evidence."

The case is thus commented on in Morris vs. Gilmer, 129 U. S., at p. 327: "What was said that was irrelevant to the determination of that question" (failure to give plaintiff an opportunity to be heard) "was unnecessary to the decision, and cannot be regarded as authoritative. The Court certainly did not intend in that case to modify or relax the rule announced in previous well-considered cases."

In Morris vs. Gilmer, jurisdiction was claimed on the ground of citizenship. There was an answer of *res adjudicata* and a replication. Thereafter and before trial defendant filed affidavits as to plaintiff's citizenship and a motion to dismiss, and depositions of the plaintiff and his father. The motion was denied in the court below. In overruling this decision, *Held:*

1. The law requires *"this Court, of its own motion, to deny its own jurisdiction,* and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, *the first and fundamental question is that of jurisdiction, first, of this Court,* and then of the Court from which the record comes."

2. This rule is "equally applicable in a case in which the averment as to citizenship is sufficient, and such averment is shown, in some appropriate mode, to be untrue."

3. "The statute does not prescribe any particular mode in which such fact may be brought to the attention of the Court. It may be done by affidavits, or the depositions taken in the cause may be used for that purpose. However done, it should be upon due notice to the parties to be affected by the dismissal."

4. The court examined the evidence, held that the plaintiff had not changed his residence, and reversed the decree.

5. "In the case before us the question was formally raised, during the progress of the cause, by written motion, of which the plaintiff had due notice, and to which he appeared and objected."

We respectfully submit that Morris vs. Gilmer controls the dicta in the Hertog case, and, the facts being almost the same, governs the decision of our case upon the issue presented.

Many cases may be found sustaining the position that a plea to the jurisdiction is no longer necessary, but that either a motion to dismiss, or a denial of information in the answer, will support a judgment dismissing a case for want of jurisdiction. Among them are:

Anderson vs. Watt, 138 U. S., 694-701.
Roberts vs. Lewis, 144 U. S., 653.
Steigleder vs. McQuesten, 198 U. S., 141.
Wells Company vs. Gastonia Co., 198 U. S., 177.

Williams vs. Nottawa, 104 U. S., 209, was an action at law by a bond holder, suing on certain bonds. On a trial of the merits, the Court directed a verdict for the plaintiff on six of the bonds of the value of $100 each, and for the defendant on the remainder, because the evidence showed that the remaining bonds had been collusively assigned to plaintiff so as to confer jurisdiction. Plaintiff brought a writ of error.

Held: "the judgment is reversed and the cause remanded with instructions to dismiss the suit."

The act of 1875 was passed

> "for the protection of the court as well as parties against frauds upon its jurisdiction."
>
> "Whether if a defendant allows a case to go on until judgment has been rendered against him, he can take advantage of the objection on appeal, or writ of error, we need not now decide. That would be a different case from this. Here the party guilty of the collusion asks relief from a judgment against himself. In such a case we deem it our duty to stop the case just where it should have been stopped in the Court below."

This case seems to be approved in Morris vs. Gilmer, 129 U. S., 315, and subsequent cases.

The first defense of the answer to the substituted complaint (p. 8 of the Record) consists of admissions of certain formal matters, and denials by paragraphs of the essential allegations of the complaint; allegations as to plaintiff's citiizenship being put in issue, as before remarked, by denial of knowledge or information. This practically amounts to a general denial,

under which by a provision of the Practice Act known as Section 609 of the General Statutes of Connecticut (1902), "The plaintiff shall be bound to prove the material facts alleged in the complaint." It was said in Roberts vs. Lewis, 144 U. S., 653, of a similar statutory rule of pleading, "The necessary consequence is that the allegation of the citizenship of the parties, being a material allegation properly made in the petition, was put in issue by the answer, and, like other affirmative and material allegations made by the plaintiff, and denied by the defendant, must be proved by the plaintiff." Judgment for the plaintiff, after verdict, was reversed.

Hill vs. Walker, 167 Fed., 241, contains such an exhaustive argument and citation of cases upon the subject of burden of pleading and proof that we may perhaps be pardoned for referring to it at some length. The plaintiff sued as a citizen of Illinois, and the defendant was alleged in the complaint to be a corporation organized under the laws of Missouri. The answer contained a general denial, which it was claimed put in issue the citizenship of the plaintiff. On the trial, the plaintiff while testifying as a witness was asked, "Where do you reside?" and answered, "I live in Vandalia, Illinois." "It is now assigned as cause for impeaching the judgment that this testimony constitutes the only evidence as to plaintiff's citizenship. The inaccuracy of the proof was in no way challenged in the trial court, but is now presented here (in the Circuit Court of Appeals) for the first time."

Judge Amidon, in discussing section 5 of the Act of 1875 says (p. 247):

"Its object was to release the federal courts from the rule of the common law by which all objections to jurisdiction were waived by pleading to the merits, and to enable those courts to protect themselves at all times against frauds upon

their jurisdiction. It does not deal with the subject of pleading in any way, save only to provide that want of jurisdiction shall be considered "at any time." The Supreme Court in applying the act has held that the question may now be brought forward in any manner either by plea, answer, or motion; but however presented, a dismissal of the cause is not authorized until it is made to appear to the satisfaction of the court by some affirmative showing in support of the pleading, whatever its form, "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court." The statute covers the entire field of dismissals for defects of jurisdiction arising upon the evidence, and not only declares the duty of federal courts upon that subject, but also prescribes the showing necessary to the exercise of the power which it grants. It requires proof which shall satisfy the court that the suit does not "really and substantially" come within its jurisdiction. The general denial has no place within its language which calls for affirmative proof and hence affirmative pleading. It was never intended to absolve counsel, when challenging the jurisdiction of the court, from the duty of framing their pleading, or other form of attack, so as to present the question clearly and directly as a subject of actual controversy. The right to hear the objection at any time, or in any manner, is for the protection of the court. It does not authorize a covert form of raising the issue without actually litigating it at the trial, but for the purpose of holding it in reserve as a possible basis of error in case of an unsatisfactory judgment. Such a procedure, instead of defeating fraud, would encourage it. While the court may seize upon any form of pleading for the purpose of protecting itself against frauds upon its jurisdiction, still counsel ought not to be permitted to use a mere form of

pleading as a means of presenting this question for the first time in an appellate court without any actual contest of the jurisdiction in the court below. Such a practice leaves the existence or non-existence of jurisdiction to be determined by a process of speculative inference from the pleadings, without disclosing the actual facts upon which jurisdiction depends. The present case is an impressive illustration of the results of such a practice. Here there is no proof of facts showing a want of jurisdiction, but simply a general denial combined with an informality in the evidence. Such is not the plan of the statute. It requires the production of evidence which shall bring the real facts to light. It is a grievous hardship for litigants to be led over the long course of federal justice in the belief that they are having their rights adjudicated, only to learn at the end that the entire proceeding is a nullity. Such a result should be strictly confined to the necessity which affords its only justification. Owing to the limited jurisdiction of the federal courts, such hardship cannot be avoided when the facts essential to jurisdiction have not been brought upon the record; but when jurisdiction has once been established by proper averments in the complaint, it should remain until proof has been produced upon an actual trial of the issue that the cause is one which, in the language of the statute, "does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court." Such a practice is within the fair intent of the act, and has received the approval of the federal courts."

Judge Sanborn concurred in the result, affirming a judgment for the plaintiff on the ground that in the state of the record the question was not open for consideration in the Circuit Court of Appeals. Judge Hook filed a dissenting opinion, citing many cases.

We must again call attention to the distinction between the facts in that case and those in the case under consideration. In the present case the allegation of citizenship was directly and distinctly challenged before trial. The court proceeded to a determination of the single question of citizenship and refused to hear the parties on the merits. The defendant produced direct and positive proof of the denial of citizenship in the answer and of the allegations in the motion to dismiss. It is once more submitted that the burden of pleading and proof was well sustained. The fact that the plaintiff read his depositions and produced his witnesses on the question of jurisdiction before the defendant was required to do so, is a mere matter of procedure entirely within the discretion of the trial judge and no objection thereto appears to have been raised at the time. In fact, it seems evident from the record, pages 15 and 16, that the plaintiff voluntarily went ahead.

The plaintiff's position amounts to this: he says in effect that the judgment is not supported by the issues made. That in substance is a claim that failure to plead to the jurisdiction under Connecticut common law practice is a waiver of the objection. Were that true, it would never be possible in a common law state to object to the jurisdiction where the lack of it appeared for the first time in the evidence. This is entirely contrary to the spirit of the statute, and in fact is distinctly denied in the passage quoted from Hill vs. Walker, upon which the plaintiff seems to put reliance in his brief. If "the court may seize upon any form of pleading for the purpose of protecting itself against frauds upon its jurisdiction," it is not easy to see why the denial and motion in the present case are insufficient as a basis for such action either in the trial court or in the Supreme Court.

PRACTICE IN CONNECTICUT.

If we turn to the practice in Connecticut, it will be found: First, that a plea to the jurisdiction must be filed, if at all, in the initial stages of a case, which is inconsistent with, and therefore must yield to the Act of 1875. Second, that the courts there have repeatedly declared their right of their own motion to dismiss a case at any stage of the proceedings, when want of jurisdiction of the subject matter becomes apparent.

PLEA TO JURISDICTION IN CONNECTICUT.

Since the Act of 1875 provides that the court shall dismiss the case *at any time* when the want of jurisdiction appears, we should naturally take it to mean, and there is no doubt that it does mean, that want of jurisdiction first developing in evidence during the course of the trial could be taken advantage of.

In a State which, like Connecticut, has no Code, and where the practice is governed by the rules of common law as modified by the Practice Act and Rules of Court, if a plea to the jurisdiction were the only method of taking this objection, the statute of 1875 could not operate.

By §155 of the Rules of Practice under the Practice Act (p. 247 of the Practice Book of 1908, published at Hartford, under authority of the Judges of the Superior Court) the order of pleading, subsequent to the complaint, is directed to be:

"(1) Plea in abatement or to the jurisdiction.
(2) Motion addressed to the complaint.
(3) Demurrer to the complaint.
(4) Answer,"

etc.

§155-a, on the same page:

"In all cases where the Court does not otherwise order the filing of any pleading provided for by §155 will waive the right to file any pleading which might have been filed in due order and which precedes it in the order of pleading provided in §155."

§12 of the Rules of the Superior Court, at p. 206 of the Practice Book of 1908, provides:

"All pleas in abatement must be filed on or before the opening of the Court on the day following the return day of the writ."

We respectfully submit that the statute of 1875 prevails over the local practice where the two might be said to be inconsistent.

If the filing of a plea to the jurisdiction is thus strictly limited in time, while an objection to the jurisdiction of the District Court may be taken at any time, there must in the nature of things be other ways of raising the objection.

The Act of 1875 gives a court authority to *dismiss* at any time, and a motion to dismiss would seem to furnish a proper foundation for such an order.

THE COURT'S DUTY TO DISMISS.

Even under the state practice a plea to the jurisdiction is unnecessary, if want of jurisdiction of the subject matter becomes otherwise apparent. In Wildman vs. Rider, 23 Conn., 172, plaintiff brought an action before a justice of the peace and obtained a judgment. Defendant appealed to the County Court, where a judgment was rendered in his favor. Plaintiffs appealed to the Superior Court, where they themselves afterwards moved that the case be erased from the docket upon the ground that it was not appealable from the

justice of the peace because the matter in demand was less than $7. The motion was not sustained by the Superior Court. On motion in error it was held:

> "It is finally said that the motion, to erase the case from the docket of the Superior Court, was made by the party that carried the case there. But this can make no difference. It was the duty of that Court to dismiss the case, whenever it discovered that it had no jurisdiction over it, and it was immaterial, by whom the knowledge of that fact was communicated."

And in Olmstead's Appeal from Probate, 43 Conn., 110-114, the Court says, speaking of a question of probate jurisdiction depending upon the former residence of the deceased:

> "It is not matter of an adversary nature, to be regarded with disfavor, like a dilatory plea. It is for the interest of the Court, and must be the desire of the Court, to know as early as possible that it has no jurisdiction, if such be the fact. If the information does not come early, it must not be rejected if it comes late. Whenever and however it comes, it should be received as the suggestion of an *amicus curiæ*, and the proper legal action promptly taken."

In Banks vs. Porter, 39 Conn., 307, a Justice of the Peace rendered judgment for the plaintiff in an action of Summary Process. This was reversed on a writ of error to the Superior Court, and the case was entered on the docket thereof for a retrial. Thereafter, on defendant's motion, the case was erased from the docket of the Superior Court. On a motion in error to the Supreme Court it was held that the statutes gave the Superior Court no jurisdiction to retry the case and that

> "Neither the order of the Superior Court, supplemental to the judgment on the writ of error,

> directing the case to be entered for trial in the Superior Court, nor any lapse of time thereafter, could affect the right of the defendant to file his motion to erase. It has been many times holden, and the rule is well settled in this state, that our courts may erase a case from the docket at any time or in any stage of the proceedings, when they discover that they have no jurisdiction of the subject matter."

It is apparent from the cases cited from the Federal and Connecticut reports that either and both of the methods which defendants used to attack the jurisdiction were sufficient to raise the question, and to found a judgment upon. The answer put the allegation of citizenship in issue. The filing of the motions to dismiss several months before the trial was out of abundant caution, and gave the plaintiff ample opportunity, of which he attempted to avail himself, to prove a citizenship in Michigan.

These assignments of error, like all the others in the case, except such as deal with the main question as to plaintiff's citizenship, are based upon actions of the court which cannot have harmed the plaintiff, if the decision upon the matter of citizenship was correct. That can be determined in this court, and affirmance upon this ground, must, as we believe, carry the whole case.

If necessary, an order might be made that the case be remanded with directions to the District Court to enter a judgment more specifically dismissing the complaint upon the motion to dismiss, but it seems to us that the answer and motion support the judgment as rendered.

It is not so that the judgment is a nullity. No precedents are or can be cited for such a proposition. The cases above referred to demonstrate this beyond question.

IV.

LACHES—SURPRISE—STATUTE OF LIMITATIONS.

THE COURT DID NOT ERR IN RULING THAT THE CLAIMED RUNNING OF THE STATUTE OF LIMITATIONS AGAINST ANOTHER ACTION COULD NOT SAVE THIS ACTION, NOTWITHSTANDING DEFENDANT'S ALLEGED FAILURE TO INTRODUCE EVIDENCE OF PLAINTIFF'S CITIZENSHIP UNTIL AFTER THE LIMITATION PERIOD HAD EXPIRED.

(Assignments of Error 20th, 22d and 23d.)

Counsel for the plaintiff in error evidently realize that no laches can be imputed to a party, in the absence of knowledge of the facts.

The defendant's knowledge upon which counsel attempt to rely, in Points III and V of their brief, are (1) The alleged knowledge of defendant Emma S. David, an administratrix of the estate of Darius Selleck (brief pp. 2 and 38). (2) The knowledge of Jessie E. Selleck, alleged in the brief (pp. 2 and 38) to be "wife of one of the executors of Benjamin Selleck."

Mrs. David was asked (record p. 48):

> "Q. Did you or not have any conversation with him" (plaintiff) "in regard to where he intended to make his future home?" "A. I did."

The Court: p. 49: "I think I will sustain the objection" (As to what this conversation was). Thus we find the plaintiff engaged in the somewhat novel attempt to found error upon evidence which was ruled out upon his own objection. While it may be perhaps assumed that the defendants would not willingly offer evidence which would harm their case,

still it seems hardly fair to ask the court to act upon what Mrs. David knew, when plaintiff prevented her from telling it.

There is a statement in the record by counsel for plaintiff in error (p. 48) that witness Jessie E. Selleck was the wife of an executor of one of the defendants, but her knowledge is not brought home either to the defendant or to the executor.

As to the contention in assignment of error No. 23, that it was error to dismiss upon evidence alleged to have been "withheld until after the plaintiff's death," we may call attention to the following facts:

No motion to dismiss was filed in the cause until after the plaintiff's deposition had been taken, and this was the first time that anything appeared except the pleadings upon which the defendant could base any action.

Referring to the record (p. 53) we find the following:

> "THE COURT: I don't really think they could raise it until there was some testimony in the case. I don't understand that they ever filed any motion to dismiss until after you took your testimony by deposition, did you, Mr. Beach?"
>
> "MR. BEACH: No, sir, it was only after the deposition was taken and in consequence of what we learned there."

Mr. Beach was counsel of record for the defendant (p. 15) and we do not understand that plaintiff in error impugns this statement made by him to the Judge in open court.

The motion to dismiss was an appropriate mode of raising the question. (Steigleder vs. McQuesten, 198 U. S., 141.)

Therefore there is no question of laches. Neither is the question of surprise, if we may so term it, one which if it existed in fact, can here be taken advantage of. The defense is not one which can be waived, but by §37 of the Judicial Code, the Court is required of its own motion to dismiss the

suit whenever it appears to its satisfaction that the jurisdiction is lacking.

Furthermore, in addition to plaintiff's admission in the brief (p. 48) that the evidence as to declarations was not objected to at the trial on the ground of surprise, we must remember that only part of the defendant's evidence consisted of declarations.

The declarations themselves were the admissions of a party-witness, exhibiting

> "the quality of inconsistency with the facts now asserted by him in pleadings or in testimony."
>
> (2 Wigmore Ev., p. 1217, § 1048.)

We need not cite cases for the proposition that

> "The rule requiring that the witness must have been *warned when on the stand*, and asked whether he has made the statement about to be offered as a self-contradiction (Ante §§ 1025 ff.) has always been understood not to be applicable to the use of a party's admissions, i. e., they may be offered *without a prior warning to the party*."
>
> (2 Wigmore Ev. § 1051, p. 1220.)

Again, General Statutes, § 1114, cited by the plaintiff in error (brief, p. 3), is the 7th section of the Connecticut Statute of Limitations, and it does not apply to the cause of action stated in the complaint in this suit. In the first place we believe it nowhere appears in the record that the alleged agreement was an oral one, and § 1114 is expressly limited to oral contracts. Assuming that it was oral, this complaint sets up an alleged agreement by the defendants to pay certain money if the plaintiff would perform certain acts, and further that the plaintiff has performed the acts and now seeks to recover the money.

Such a cause of action is governed by the six year statute of limitations, which is the third section, and is now known as General Statutes of 1902, § 1110, the material part of which reads as follows:

> "*Actions on simple or implied contracts limited to six years.*
>
> No action for an account, or for a debt due by book to balance book accounts, or on any simple or implied contract, or upon any contract in writing not under seal, except promissory notes not negotiable, shall be brought but within six years next after the right of action shall accrue."

In Baker vs. Lee, 52 Conn., 145, it is held that an action to recover money damages for breach of a contract where plaintiff has fully executed his part of the agreement, falls within the latter section. Consequently, the answer, filed in August, 1907, and in effect denying the allegation as to citizenship, gave plaintiff full opportunity to withdraw and sue in the State court, had he wished. As to that, the plaintiff in error states in the brief that this case was a continuation of the so-called Head litigation, in which, as the complaint alleges, judgment for about $8,000 was rendered against plaintiff in the State courts. Possibly recourse to another forum might appeal to him as likely to be more profitable. In fact, the fourth defence (p. 9 of the record) is based upon the theory that the state court in the Head litigation found and determined the issues presented by this complaint. This, if true, would seem to furnish a sufficient motive for a desire to sue in the Federal Court.

Discussion of the question has become further complicated since the action of the Connecticut General Assembly in the session of 1913 in passing an amendment to the saving statute.

In Ch. 206, Public Acts 1913, p. 1830, we find the following enactment:

> "Section 1127 of the general statutes is hereby amended to read as follows: In any action commenced within the time limited by law, if the writ shall fail of a sufficient service or return by unavoidable accident or by default or neglect of the officer to whom it is committed, or if the writ is abated or the action is otherwise avoided or defeated by the death of a party or for any matter of form, or if, after a verdict for the plaintiff, the judgment is arrested, or if any judgment of non-suit is rendered in any action, or if a judgment for the plaintiff is reversed, the plaintiff, or, if the plaintiff be dead and the action by law survive, his executor or administrator may commence a new action for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment. Where any action is brought against an executor or administrator or continued against an executor or administrator, after the death of the defendant, and has failed for any of the causes above mentioned, the plaintiff, or his executor or administrator in case a cause of action survives, may commence a new action within six months after such determination of the former one. If an appeal be had from any such judgment to the Supreme Court of Errors, the time such case is pending upon such appeal shall be excluded in computing the time as above limited. The provisions of this section shall apply to any defendant who files a cross-complaint in any action. *This act shall apply to any action brought to the United States district court for the district of Connecticut which has been dismissed without trial upon its merits, or because of lack of jurisdiction in said court*, and in case such action is within the jurisdiction of any state court the time for bringing such action to said state court shall commence from the date of such dismissal in the United States Court, or, if an appeal or writ of error is taken from such dismissal, from the final determination of such appeal or such writ of error."

So much of this act as applies to actions brought to the United States Courts is an addition to section 1127 of the General Statutes of 1902, and although it was passed while this case was pending, we shall, if this judgment is affirmed, doubtless be met by a claim that it operates retroactively, being a remedial statute, and going to a matter of adjective law. If that is so, the plaintiff will still have the right to bring his action to the proper State Court, though this writ of error be dismissed.

V.

JURY TRIAL—ELECTION.

THE COURT COMMITTED NO ERROR IN TAKING THE QUESTION OF JURISDICTION FROM THE JURY.

(Assignments of Error, 1, 2, 3, 4, 7, 8, 9.)

Although the plaintiff now expressly disclaims error concerning the actions of the trial court in taking the case from the jury and depriving him of an argument, yet as these points seem to have become involved in certain portions of his brief, they will be briefly noticed.

It is well settled that the Court has discretion under 36 Stat. L., Part 1, p. 1098, Ch. 3, § 37 (the so-called Act of March 3, 1875) to decide controverted questions of fact as to jurisdictional matters, either with or without the aid of a jury. (Globe Refining Company vs. Landa Cotton Oil Company, 190 U. S., 540; Smithers vs. Smith, 204 U. S., 632—though in that case a jury had been waived; Wetmore vs. Rymer, 169 U. S., 115—verdict set aside.)

The facts that a jury had been impanelled, and heard the pleadings read, have no bearing upon the question. The words of the statute that the Court may dismiss the case "at any time," mean what they say.

Rosenbaum vs. Bauer, 120 U. S., 450, 459.

Referring to the Ninth Assignment of Error, we know of no rule of law or policy which imposes upon a trial judge under any circumstances any such duty of "election" as is there attempted to be defined.

VI.

DEPRIVATION OF RIGHT OF ARGUMENT.

THE COURT COMMITTED NO ERROR IN REFUSING TO HEAR ARGUMENT UPON THE QUESTION OF JURISDICTION.

(Fourth and Fifth Assignments of Error.)

The plaintiffs in error, in their Fifth Assignment, touch upon the weak point of their position with respect to this. The trial Judge *has* a discretion with respect to the conduct of trials, and, where the case has been properly taken from the jury, as here, it rests with him to decide whether or not he desires the assistance of the arguments of counsel. Furthermore, the plaintiffs in error cannot have been harmed by this procedure, for they can be fully heard in this Court, which has power to look at the facts and decide the issue. Cases where this has been done are numerous. Among them are:

Morris vs. Gilmer, 129 U. S. 315, 324.
Steigleder vs. McQuesten, 198 U. S., 141.

That being so, an Appellate Court will ordinarily not send the case back, "merely to give an opportunity to make a speech."

Harrison vs. Park, 24 Ky., 170.
Barnes vs. Benham (Okla. 1904) 75 Pac., 1130.
Bradish vs. Grant (1886) 119 Ill., 606.
Deering vs. Halbert, 12 Ky., 290.

VII.

TAX LISTS.

THE TRIAL COURT DID NOT ERR IN ADMITTING IN EVIDENCE AND IN CONSIDERING THE TAX LISTS.

(Assignments of Error Sixteenth to Nineteenth, inclusive.)

Upon the offering of these lists in evidence, the plaintiff objected to their admission, on the ground, as we understand it, that every *resident* of Connecticut, whether a citizen or not, is bound to pay a personal tax (see G. S. Conn., 1902, § 2313).

G. S. Conn. 1902, § 2323, in force during the period in question, provided in part that "All . . . goods, chattels, effects or any interest therein belonging to any resident in this State, shall be set in his list in the town where he resides."

This section is cited in Comstock vs. Waterford, 85 Conn., 9, for the well settled proposition that

> "It is a general rule that personal property liable to taxation *follows the domicile of the owner.*"

The tax lists in evidence, following page 58 of the record, include items of personal property assessed against the plaintiff as well as poll taxes.

Though residence does not constitute domicile or citizenship, yet it is an element of each, and any fact tending to prove it is pertinent.

The fact that plaintiff was not an elector, goes only to the weight of this evidence; not to its admissibility. He was in a position to qualify as an elector. (See Art. VIII, Amendments to Constitution of Connecticut, G. S. 1902, p. 53.)

"ARTICLE EIGHT.

Adopted October, 1845.

Every white male citizen of the United States, who shall have attained the age of twenty-one years, who shall have resided in this State for a term of one year next preceding, and in the town in which he may offer himself to be admitted to the privileges of an elector, at least six months next preceding the time he may so offer himself, and shall sustain a good moral character, shall, on his taking such oath as may be prescribed by law, be an elector."

The fact that he could have qualified is nearly as conclusive as if he had actually been made a voter. (See Shelton vs. Tiffin, 6 How., 163.) The fact that he neglected his right to vote is neither unusual nor persuasive.

Nothing in the record shows that the Court gave undue or controlling weight to the tax lists, as claimed in Assignment Nineteenth.

Further, if we should adopt plaintiff's theory as to this point, the admission of these lists caused no injury to him. If our position upon the main question is correct, and the case was properly dismissed, it is immaterial that the Court may have proceeded upon a wrong theory.

> Sullivan vs. Iron Silver Mining Co. 143 U. S., 431.
>
> "The result is right although the manner of reaching it may have been wrong."
>
> First National Bank of Decatur vs. Home Savings Bank, 21 Wall., 294.

CONCLUSION.

Prolonged argument of these subordinate points seems fruitless, however. The whole case turns upon the *one question, was the plaintiff a citizen of Connecticut.* If the answer ought to be in the affirmative, all else drops away. Under § 37 of the Judicial Code the plaintiff must leave the United States Courts, irrespective of any claimed or actual errors in the conduct of the case below. Upon this hypothesis the judgment ought not to be reversed, because the District Court in fact has no jurisdiction of the case. A new trial ought not to be granted, because it would be futile. Alleged technical mistakes might be corrected, if they exist, but the ultimate result must be the same.

The judgment ought to be affirmed.

Respectfully submitted,

DEFENDANTS IN ERROR,

By A. T. BATES,
BRISTOL & WHITE,
Their Attorneys.

A. T. BATES,
FREDERICK H. WIGGIN,
Of Counsel.